Supreme Court, U.S.
FILED

No. _____ 09-773 DEC 28 2009

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

STEVEN LERMAN, ET AL.,

Petitioners,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. PANCIER
LAW OFFICES OF
MICHAEL A. PANCIER, P.A.
9000 Sheridan Street
Suite 96
Pembroke Pines, FL 33024
Tel: 954-862-2217
Email:
mapancier@pancierlaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The City of Fort Lauderdale, Florida established a Deferred Retirement Option Plan ("DROP") for its Police Officers and Firefighters. Eligibility in the plan is based on 20 years of service and an age component (originally age 47 and then amended to age 45). If the officer elected to enter DROP, the officer was required to submit an irrevocable letter of resignation, and an executed Waiver And Release Agreement. This election established the officer as retired in the sense that he or she no longer accrued additional years of service credit towards normal retirement. However, the officer continued to work while receiving regular pay and benefits for the number of months provided by the DROP plan including normal monthly pension payments he or she was eligible for, but such payments were made into a separate interest bearing account. At the end of the DROP period, (originally three years and later five years), the officer ceased employment, and, at the officer's discretion, received the amount in the aforementioned account in one lump sum, or by rolling it over into another tax-qualified retirement plan.

The questions presented are:

1. Whether under section 4 of the LILLY LEDBETTER FAIR PAY ACT of 2009 a new cause of action accrues each time an employee receives wages, benefits, or other compensation that is less than that received by

QUESTIONS PRESENTED – Continued

similarly situated younger employees because of the employee's age pursuant to a deferred retirement plan notwithstanding the fact that the employee executed an OWPA approved release of claims under the ADEA as a precondition of participating in such deferred retirement plan.

2. Whether the retroactive amendments to the ADEA by the LILLY LEDBETTER FAIR PAY ACT of 2009 allow employees who elected to participate in a deferred retirement plan which going forward negatively affected their wages and benefits and other compensation because of their age, to make a post waiver age discrimination challenge to the deferred retirement plan.

3. Whether circumstantial evidence that an age component was added to a Deferred Retirement Option Plan by a municipality to get its senior police officers to retire as soon as possible sufficient to create a triable issue of fact as to whether the DROP's age component was a "proxy for age" in violation of the ADEA in light of this Court's decision in *Kentucky Retirement Systems v. EEOC,* 128 S.Ct. 2361 (2008).

PARTIES TO THE PROCEEDING

The additional Petitioners are:

Fred Ross, James Townsend, and Lawrence Lohsen.

Steve Holt, Frank Del Rio, David Ecklund, James Gaughan, Timothy Falk, David Nickerson, Stephen Littlefield, Jim Wigand, Sam Wernick, and Stephen Medley, were plaintiffs/appellants below. They have not joined in this Petition. The term "petitioners" as used throughout this petition denotes the other four individuals.

The additional Respondent is the City of Fort Lauderdale Police Officers' & Firefighters' Retirement Board, who has entered into a stipulation with the plaintiffs in which it conceded the Court's jurisdiction and agreed to "comply with any relief that may be ordered by the Court."

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINION AND JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	13
I. THE ELEVENTH CIRCUIT INTERPRETS THE ADEA AND OWPA IN A WAY THAT CONTRAVENES THE 2009 LEDBETTER AMENDMENTS TO THE ADEA.	13
II. LOWER COURTS CLEARLY NEED GUIDANCE RESPECTING THE PROPER APPLICATION OF THE 2009 LEDBETTER AMENDMENTS IN DISCRIMINATION CASES	18
III. REVIEW WILL PROVIDE COURTS GUIDANCE IN DETERMINING THE THRESHOLD OF EVIDENCE NECESSARY TO CREATE A TRIABLE QUESTION OF FACT UNDER *KENTUCKY RETIREMENT SYSTEMS* REGARDING WHETHER A PENSION PLAN'S AGE COMPONENT IS A PROXY FOR AGE DISCRIMINATION	22
CONCLUSION	27

TABLE OF CONTENTS – Continued

Page

APPENDIX

September 28, 2009 Order and Judgment of the Court of Appeals for the Eleventh Circuit ..... App. 1

December 23, 2008 Order and Judgment for the United States District Court for the Southern District of Florida ..... App. 6

Statutory Provisions Involved

LILLY LEDBETTER FAIR PAY ACT OF 2009, Pub. L 111-2 (S 181) (January 29, 2009) ..... App. 43

TABLE OF AUTHORITIES

Page

CASES

Bazemore v. Friday, 478 U.S. 385 (1986).....15, 20

Bush v. Orange County Corrections Dept., 597 F. Supp.2d 1293 (M.D. Fla. 2009).....20

EEOC v. O'Grady, 857 F.2d 383 (7th Cir. 1988).....14

Florida v. Long, 487 U.S. 223 (1988).....14, 20

Gentry v. Jackson State University, 610 F. Supp.2d 564 (S.D. Miss. 2009).....19

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).....23, 24

Kentucky Retirement Systems v. EEOC, ___ U.S. ___, 128 S.Ct. 2361 (2008) .....*passim*

Lilly Ledbetter v. Goodyear Tire & Rubber, Co., 550 U.S. 618 (2007).....18

Lerman v. City of Fort Lauderdale, 2008 WL 5378127 (S.D. Fla. 2008).....1

Oubre v. Entergy Operations, Inc., 522 U.S. 422 (1998).....12

Rehman v. State University of New York at Stony Brook, 596 F. Supp.2d 643 (E.D.N.Y. 2009).....19

Shockley v. Minner, Civil Action No. 06-478 JJF, 2009 WL 866792 (D. Del., March 31, 2009).....19

Snair v. City of Clearwater, 787 F. Supp. 1401 (M.D. Fla. 1992) 14

TABLE OF AUTHORITIES – Continued

Page

Stone v. INS, 514 U.S. 386 (1995) 16

Tomlinson v. El Paso Corporation, 2009 WL 2766718 (D. Colo., Aug. 28, 2009) 20

United States v. Wilson, 503 U.S. 333 (1992) 16

Vuong v. New York Life Insurance Co., No. 03 Civ. 1075 (TPG), 2009 WL 306391 (S.D.N.Y., Feb. 6, 2009) 19

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

29 U.S.C. §§ 621-634 3

29 U.S.C. § 623 3

29 U.S.C. § 626(f)(1)(c) 17

Florida Statutes §§ 760.01-760.11 3

OTHER

H.R. Report 110-237 15

LILLY LEDBETTER FAIR PAY ACT OF 2009, Pub. L. 111-2 ..... *passim*

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION AND JUDGMENT BELOW

The District Court's opinion, unofficially reported at 2008 WL 5378127 (S.D. Fla., December 23, 2008), is reprinted in the Appendix ("Pet. App.") at 6a-42a. The Court of Appeals' unpublished order, unofficially reported at 2009 WL 3065199 (11th Cir., September 28, 2009), is reprinted at Pet. App. 1a-5a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331. The Court of Appeals issued its judgment on September 29, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portion of the LILLY LEDBETTER FAIR PAY ACT OF 2009, Pub. L. 112-2:

SEC. 4. DISCRIMINATION IN COMPENSATION BECAUSE OF AGE.

Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended –

* * *

(3) by adding at the end the following:

"(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice."

* * *

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation . . . the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), . . . , that are pending on or after that date.

The entire text of the LILLY LEDBETTER FAIR PAY ACT OF 2009 is reprinted at Pet. App. 43a-49a.

Pertinent provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1) provides in part:

> It shall be unlawful for an employer –
>
> (1) to . . . otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

STATEMENT OF THE CASE

Introduction

In 2002, Petitioners, then current and former police officers with the City of Fort Lauderdale Police Department, filed suit against the City of Fort Lauderdale, Florida ("City"), under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 and the Florida Civil Rights Act of 1992, §§ 760.01-760.11, challenging the legality of the City's Deferred Retirement Option Plan, otherwise known as the "DROP"[1] which had been enacted by the City in

[1] The Plaintiffs had also sued their union, the Fraternal Order of Police, but have since dismissed it from this action. The Plaintiffs also sued the pension board which has advised the parties that they would comply with any order of the court which relates to the DROP plan.

March of 1997 and substantially modified in October 2000. Petitioners alleged that the DROP plan, which on its face contained an age eligibility requirement, discriminated against them by providing them a lower benefit amount than similarly situated younger officers with equal tenure in the Department. In other words, the older an officer was when he or she entered the department, the less benefits he or she was eligible to receive. But for the age component in the DROP, the Petitioners were precluded from participating in the full 60 month DROP plan while at the same time being allowed to continue working so as to allow them to maximize their pensions. Specifically, Petitioners Lerman, Townsend, Lohsen, and Ross contend that the City's DROP's age eligibility requirement, discriminated against them and the other older most senior officers in the department as the older an officer is when he or she enters the department, the less retirement benefits he or she will receive under this plan. Specifically, the DROP's age component penalized the benefits that older officers could receive while younger police officers with identical seniority were not affected.

In the case *sub judice,* the district court granted the City's Motion for Summary Judgment based primarily on the waivers executed by the Petitioners. However, since that ruling, the legal landscape substantially changed by the enactment of the LILLY LEDBETTER FAIR PAY ACT OF 2009, Pub. L. 111-2. The ACT, which applies retroactively to all cases to all claims of discrimination in compensation under the

ADEA that, like this case, were pending on or after May 28, 2007, holds that an employment practice is unlawful "when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." Pet. App. 47a. This is significant because unlike typical retirement plans where an employee signs a waiver, retires shortly thereafter and receives a lump sum payment, in this case, an employee who enters the DROP can continue to work for the City for up to 60 additional months. Thus, Petitioners submit that under the 2009 amendments, any post-waiver conduct is in and of itself actionable. The LEDBETTER ACT codifies this longstanding principal into the bedrock of all compensation claims brought under the various anti-discrimination laws, including the ADEA. In light of this change in the law, the district court's holding with respect to the waivers can no longer stand.

Further, it is undisputed that the DROP plan discriminates against any veteran officer who happens to be 45 years or age or older at their 20 year service date. This class of officers, which includes the Petitioners, is faced with the Hobson's choice of 1) entering into the DROP for its full term of 60 months at a reduced pension benefit accrual rate (currently 67% for 20 years) and retire; or 2) continue working to maximize the pension benefit accrual rate (81% with 24 years of service) and then enter DROP which has been drastically reduced or totally eliminated

since the time for eligibility reduces each month from the date of eligibility. Under either scenario, the officer stands to lose a significant amount of money. However, a similarly situated younger officer is entitled to full DROP participation at the maximum pension benefit accrual rate. The sole reason for this disparity is age, not pension status.

Thus, the district court also erred by holding as a matter of law that the disparate treatment in DROP benefits between Petitioners and their similarly situated younger counterparts was as a result of pension status rather than age. The district court erroneously disregarded the impact of the testimony evidence of age bias attributed to the City's Chief Negotiator such that the City refused to eliminate the age component of the DROP because it wanted the older more senior officers to retire sooner. This evidence, which if viewed in the light most favorable to Petitioners, calls into questions the motivation behind the City's insistence on requiring an age component along with years of service as a condition of entering into the DROP.

On Appeal, the Eleventh Circuit without discussion disregarded the plain statutory text of the LEDBETTER ACT holding it inapplicable because Petitioners had executed waivers prior to entering into the DROP plan even though the Petitioners were still employees of the City and were receiving weekly paychecks affected by their age and despite the fact that Petitioners were given less months of DROP than their similarly situated counterparts.

The Record Below

The background of this case was summarized by the district court and is undisputed:

> On October 15, 1996, as the result of negotiations with FOP, the City implemented the retirement plan at issue, namely the Deferred Retirement Option Program (hereinafter "DROP"). Set to become effective March 1, 1997, officers became eligible for DROP upon reaching 20 years of service and 47 years of age. DE 51, Ex. 15, ¶ 9. Upon becoming eligible, an officer remained eligible for DROP for 36 months. *Id.* If he or she elected to enter DROP, the officer submitted an irrevocable letter of resignation, and signed a document entitled "City Of Fort Lauderdale Deferred Retirement Option Program OWBPA Acknowledgment, Waiver And Release Agreement."
>
> This election established the officer as retired in the sense that he or she no longer accrued additional years of service credit towards normal retirement. *Id.* at ¶ 7. However, the officer continued to work while receiving regular pay and benefits. More importantly, the officer received the normal monthly pension payments he or she was eligible for, but such payments were made into a separate interest bearing account. *Id.* At the end of the DROP period, the officer ceased employment, and, at the officer's discretion, received the amount in the aforementioned account in one lump sum, or

by rolling it over into another tax-qualified retirement plan. *Id.*

Although an officer was able to enter DROP any time during the 36 months following his or her first date of eligibility, the period of DROP participation was measured from the first date of eligibility. DE 66, ¶ 7. In other words, every month that an officer delayed entering DROP upon reaching eligibility was a month that the officer would not be eligible to participate in DROP. If an officer waited 24 months after initial eligibility to enter DROP, he was only entitled to participate in DROP for 12 months.

In addition to modifying the terms of normal retirement, the 2000 Agreement also amended the terms of DROP, which became effective October 1, 2000. First, the period of possible DROP participation was extended from 36 months to 60 months. Additionally, the age component of DROP was lowered from 47 years of age to 45 years of age. DE 66, ¶ 9. While the years of service component remained the same, officers were made eligible for DROP upon reaching 20 years of service regardless of age. *Id.* However, an officer did not begin to lose time from his DROP participation period upon simple attainment of 20 years of service. Rather, the clock only began to run in a manner that shortened the DROP period upon the attainment of *both* 20 years of service and 45 years of age. *Id.*

> With one exception discussed below, the 2000 Agreement's modifications to DROP did not change the initial eligibility dates of those officers who became eligible for the program prior to the amendment's effective date. Said Agreement did, however, give DROP-eligible or DROP-enrolled officers the benefit of the 24 extra months and the increased multiplier that had been negotiated. Specifically, there were 12 officers who became DROP eligible prior to October 1, 2000, and elected to enter DROP. DE 61, ¶ 16. Those officers' DROP period was extended for an additional 24 months, DE 66, ¶ 10, and they were given the benefit of the negotiated increased multiplier percentage. DE 61, ¶ 16. Officers who became DROP eligible prior to the new effective date and opted not to enroll, and whose period of DROP eligibility had not closed, had 24 months added to whatever period of DROP eligibility remained. DE 66, ¶ 10. One exception to the rule that officers did not have their eligibility date changed was made for officers who had become DROP eligible prior to October 1, 2000, had elected not to enter DROP, and whose 36-month DROP eligibility period had passed. These officers were given an additional opportunity to enroll in DROP for 17 months. *Id.*

Pet. App. 9a-12a (footnotes omitted). Further, evidence was presented that Tom Mangifesta, who was the President of the Fort Lauderdale Fraternal Order of Police ("FOP"), was produced as the FOP's Rule 30(b)(6) representative to testify as to the contract

negotiations the FOP had with the City regarding the 2000-2003 collective bargaining agreement. Pet. App. 15a-16a. Detective Mangifesta testified that although FOP proposed alternative DROP arrangements where age was not a factor, the City always insisted that age remain as a component. *Id.* Additionally, Detective Mangifesta testified that when he asked the City's Employee Relations Director and chief negotiator M. Scott Melinski why the City so insisted, Melinski responded that "[the City] wanted senior officers to retire as soon as possible." *Id.* Petitioners submit that given the DROP plan's age component coupled with Mangifesta's testimony, a reasonable jury could find that the age component was used as a proxy for age discrimination.

The District Court Proceedings

Summary judgment motions had been pending for nearly four (4) years; however, due to the then pendency of the *Kentucky Retirement Systems v. EEOC* case before this Court, on December 4, 2007, the district court stayed the instant case pending this Court's decision. Following this Court's June 19, 2008 decision in *Kentucky Retirement Systems v. EEOC*, ___ U.S. ___, 128 S.Ct. 2361 (2008), this case was reopened and the parties submitted updated summary judgment motions. On December 23, 2008, the district court entered an order denying Petitioners' Cross Motion for Partial Summary Judgment and granted the City's Motion for Final Summary Judgment entering a final judgment in favor of the

City. *See* Pet. App. 6a-42a. In its ruling, the district court held that each of the Petitioners "released the City from liability it may otherwise have had" for any age discrimination claims, and alternatively, found that the "DROP [was] non-discriminatory as to all Plaintiffs." *Id.* at 42a. More specifically, as to the second point, the district court found that "the City's DROP program falls within the safe harbor provision of the ADEA because it is voluntary and in accord with the purposes of the ADEA [and] any disparity between Plaintiffs and others is attributable to their pension status, not their age." *Id.* On January 22, 2009, Petitioners timely filed their Notice of Appeal.

On January 29, 2009, the President signed into law the LILLY LEDBETTER FAIR PAY ACT of 2009, Pub. L. 111-2, which significantly amended certain provisions of the ADEA. The LEDBETTER ACT further states that the ADEA amendments shall apply retroactively to all cases that were pending on or after May 28, 2007." Pet. App. 49a. Since this case was pending on May 28, 2007, Petitioners contend that the LEDBETTER amendments apply to this case and made this argument before the Eleventh Circuit Court of Appeals.

Petitioners argued that under the 2009 amendments to the ADEA, specifically that an unlawful practice occurs "when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting whole or in part from such a decision or other practice," provided the

Petitioners with the ability to challenge the DROP plan notwithstanding their previously executed waivers as: 1) a waiver cannot be applied prospectively as to claims that have not yet accrued, and 2) Petitioners were still employed by the City and their compensation was clearly affected by the amount of DROP time they were not afforded but for their age.

The Eleventh Circuit ignored the plain meaning of the 2009 amendments and simply held that the amendment did not apply and that the waivers were controlling. Pet. App. 3a-4a. The Eleventh Circuit further misstated the Petitioners' position by suggesting that one's rights under the ADEA could never be waived. This was not the case. Petitioners argue that prospective rights as to claims not yet accrued could not be waived. Arguably, while the waiver would have released any claims that preceded its execution, because the Petitioners continued to work for the City but were only afforded less DROP time, their earnings and monthly DROP payments were less than what they would have otherwise received but for their age. The Eleventh Circuit, after summarily adopting the district court's ruling, concluded:

> Having reviewed the record, we find no error in the district court's determination that on this record, the waiver at issue was knowing and voluntary and that an employee can waive his or her ADEA rights. *See, e.g., Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426-7, 118 S.Ct. 838, 139 L.Ed.2d 849

> (1998) (holding that an employee may waive ADEA rights if the waiver complies with the OWBPA); *Lloyd v. Brunswick Corp.*, 180 F.3d 893, 895 (7th Cir. 1999) ("Employees are free to waive their ADEA rights.") (citation omitted).
>
> Moreover, we reject the Officers' argument that the LLFPA somehow precludes application of the waivers they validly executed. The LLFPA was passed in response to the Supreme Court's decision in *Lilly Ledbetter v. Goodyear Tire & Rubber, Co.*, 550 U.S. 618, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007), which involved the statute of limitations in pay discrimination cases. We find the LLFPA inapplicable in this case and affirm the district court's ruling that the Officers, . . . validly waived their rights under the ADEA.

Id. at 4a.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT INTERPRETS THE ADEA AND OWPA IN A WAY THAT CONTRAVENES THE 2009 LEDBETTER AMENDMENTS TO THE ADEA

As part of the 2009 amendments, Congress, in plain terms, declared in pertinent part:

> For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this

> Act, . . . *when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.* [emphasis added].

Pub. L 111-2, Section 4, Pet. App. 46a-47a. The Eleventh Circuit's holding that the LEDBETTER ACT does not apply to employees who execute ADEA waivers but who continue to work for the employer and continue to receive less benefits and compensation than their similarly situated younger counterparts renders most of the 2009 amendments meaningless.

Prior to May 28, 2007, with respect to retirement plans, such as the DROP plan that is being challenged herein, *the general rule* had been such that "[w]here [an employer's discriminatory] policy is current . . . the employee may consider his action to have accrued on the date of actual retirement." *EEOC v. O'Grady,* 857 F.2d 383, 386 n. 7 (7th Cir. 1988); *see also Florida v. Long,* 487 U.S. 223 (1988); *Snair v. City of Clearwater,* 787 F. Supp. 1401 (M.D. Fla. 1992). In fact, "[p]lans which are facially discriminatory may be challenged at any time while the plan is in effect." *Snair*, 787 F. Supp. at 1407 n. 13.

This case is not one regarding the treatment of when pension payments are paid as would occur in a typical retirement case. For example, in *Long,* this Court refused to apply a continuing violation principle

to a pension plan, distinguishing the case from the "pattern and practice" analysis of *Bazemore v. Friday*, 478 U.S. 385 (1986). *Id.* Similarly, the LEDBETTER ACT expressly provides that it is not "intended to change current law treatment of when pension distributions are considered paid," Pub. L. 111-2 Section 2 Findings, at section 4. Pet. App. 45a. This indicates that the Congress understood that there are significant differences between compensation and retirement benefits. This is borne out in the legislative history, in which *Long* is cited for the proposition that while a paycheck scheme is applied to every paycheck, a pension structure is applied only once, when the employee retires, and the pension checks merely flow from that single application. H.R. Report 110-237 at 18.

In the instant case, the district court and the Eleventh Circuit held that the waiver executed by Petitioners barred their ability to challenge the DROP plan. However, what neither court addressed was whether the Petitioners could challenge any post-waiver effects of the DROP. This case does not concern the payment of retirement benefits pursuant to a retirement plan, as was the issue in *Long*; rather, it is the accrual of benefits and the ability of the Petitioners to continue working under this program for additional months. But for the ages of the Petitioners, they would have been able to participate in up to 60 months of DROP allowing them to receive, *inter alia*, their regular salaries, overtime, and off-duty police details. Pet. App. 8a, 11a-12a, 15a, 36a-37a. Further, the Petitioners would have been able to

collect up to 60 payments in their pension account rather than the amounts that were offered to them because of their age (e.g., Lerman received 44 months of DROP eligibility).

Thus under the plain language of the LEDBETTER ACT, "each time wages, benefits, or other compensation is paid" post-waiver by the City to the Petitioners while they are in the DROP plan, a new cause of action accrues regardless of when the decision to include the age component was made. It is axiomatic that "when Congress alters the words of a statute, it must intend to change the statute's meaning." *United States v. Wilson,* 503 U.S. 333, 336 (1992); *Stone v. INS,* 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

In the district court decision, which was adopted by the Eleventh Circuit, the district court relying on the law in place before the enactment of the LEDBETTER ACT, and held that the Petitioners' cause of action accrued when they "knew or should have known of [their] injury and its cause" which was prior to their executing the waivers. Pet. App. 22a-24a. Petitioners submit that the "discovery" rule is inconsistent with the plain language of the 2009 LEDBETTER ACT especially where as here, the employee continues to work for the employer and is receiving compensation adversely affected in whole or in part by his or her age.

The 2009 LEDBETTER amendments to the ADEA clearly state that it is an unlawful employment practice "when a person is affected by application of a discriminatory compensation decision or other practice." Clearly, the Petitioners were not affected by the discriminatory compensation practice until after they executed the waiver and continued working up through their retirement date, which was less than the maximum number of months they could have been entitled to but for their age. Furthermore, allowing the Petitioners to proceed and challenge the DROP plan post-waiver while they are still employed is consistent with OWPA as it is axiomatic that a release of ADEA rights must only pertain to current rights and claims as of the time the waiver is signed. 29 U.S.C. § 626(f)(1)(c).

While the district court did not have the benefit of the LEDBETTER amendments to the ADEA when it granted the City's Motion for Summary Judgment, the Eleventh Circuit's decision to dispose of this case by summary order without addressing the important issues raised by the enactment and retroactive application of the amendments heightens the necessity of this Court's review.

II. LOWER COURTS CLEARLY NEED GUIDANCE RESPECTING THE PROPER APPLICATION OF THE 2009 LEDBETTER AMENDMENTS IN DISCRIMINATION CASES

Congress enacted the LEDBETTER ACT primarily to overturn this Court's decision in *Ledbetter v. Goodyear Tire & Rubber, Co.*, 550 U.S. 618, 637 (2007) which held that where there was no evidence that the employer "initially adopted its [pay-rate system] in order to discriminate . . . or that it later applied this system . . . within the [statutory] period with any discriminatory animus," the mere fact that "this discrimination reduced the amount of later pay-checks" did not mean that "each new paycheck constitutes a new violation." The reasoning behind this Court's original decision was that a new violation of law did not take place upon the occurrence of subsequent nondiscriminatory acts that were the byproduct of past discrimination. Congress rejected this reasoning in the LEDBETTER ACT and stated that any time an employee is affected by the application of a discriminatory compensation decision or other practice, the law, and in this case the ADEA, is violated. Congress did not include any language in the amendment that creates an exception for deferred retirement plans or for post-waiver ongoing discriminatory conduct.

So while the creation of the DROP plan may be deemed a discrete act, the effect of said plan which affects the compensation of the Petitioners while in

the DROP plan, post-waiver, is covered by LEDBETTER. This interpretation is consistent with some of the early decisions interpreting the LEDBETTER ACT. In *Gentry v. Jackson State University*, 610 F. Supp.2d 564 (S.D. Miss. 2009), the district court denied summary judgment in a denial of tenure case that would have been time barred for failure to file a timely EEOC charge as a result of the LEDBETTER ACT since the plaintiff had asserted that the denial of tenure also denied her a salary increase and hence a compensation decision. *Id.* at 567. In *Vuong v. New York Life Insurance Co.*, No. 03 Civ. 1075 (TPG), 2009 WL 306391, 7 (S.D.N.Y., Feb. 6, 2009), the district court held that the plaintiff's August 2, 2002 charge was untimely with respect to a failure to promote claim from January 1998, but held timely a discriminatory pay allocation claim that had gone into effect in February 1998 as he was still being paid under that plan at the time the EEOC charge was filed. *See also Rehman v. State University of New York at Stony Brook,* 596 F. Supp.2d 643, 651 (E.D.N.Y. 2009) (in case involving allegations that defendant refused to propose the plaintiff for appointment to associate or full professor with tenure, court held that although plaintiff filed his EEOC charge on April 13, 2007, under LILLY LEDBETTER FAIR PAY ACT, his wage discrimination claims based upon actions occurring on or after April 13, 2005, two years prior to his EEOC charge, were timely, which claims presumably included the defendant's refusal to consider him for tenure); *Shockley v. Minner,* Civil Action No. 06-478 JJF, 2009 WL 866792, *1 (D. Del., March 31, 2009)

(applying LILLY LEDBETTER FAIR PAY ACT to find failure to promote claim timely); *Bush v. Orange County Corrections Dept.*, 597 F. Supp.2d 1293, 1295 (M.D. Fla. 2009) (holding that while plaintiffs' complaint about demotions and pay reductions that occurred sixteen years before EEOC charge was filed would plainly be barred under the Supreme Court's *Ledbetter* decision, "with the passage of the [LILLY LEDBETTER FAIR PAY ACT] Plaintiffs' Title VII claims [were] no longer administratively barred").

In *Tomlinson v. El Paso Corporation*, 2009 WL 2766718 (D. Colo., Aug. 28, 2009), the plaintiff filed a claim alleging that the conversion of his benefit pension plan violated the ADEA. The district court had originally granted summary judgment based on the charge being more than 300 days from when, like here, the plaintiffs became aware of the discriminatory effect of the plan. However, with the passage of the LEDBETTER ACT, the district court vacated its prior decision. The district court noted that, as in this case, the plaintiff's charge of discrimination was filed "when he was an active employee and did not concern payment of retirement benefits," and therefore *Bazemore* and *Long* did not apply. The court held that given the LEDBETTER ACT's retroactive application and plain statutory text, the plaintiff's claims were timely as there was a violation each time he was "affected" by each paycheck where he contributed to a pension plan:

> The Act covers "wages, benefits, or other compensation," which appears to include

> employer contributions to a pension plan. It provides that a discriminatory act occurs when an individual is "affected" by the application of a discriminatory compensation decision or other "practice," which could plausibly include the accrual of pension benefits. There does not appear to be any dispute that Mr. Tomlinson accrued a pay credit within 300 days of his charge of discrimination, since he did not retire until several years after his charge. Because that pay credit allegedly did not result in any increase to his pension benefit during the wearaway period, it would appear that this is an application of an allegedly discriminatory practice affecting Plaintiff, and could plausibly bring it within the ambit of the Ledbetter Act.

Id. at *4.

While the above examples deal with the timely filing of an EEOC charge, they are equally instructive to the case at bar. The City's age component in the DROP plan penalized the Petitioners by not affording them a full 60 month DROP period. Those lost months caused the Petitioners to receive less DROP money into their deferred retirement accounts and also resulted in their employment ending prematurely resulting in, among other things, a loss of wages, benefits, overtime, and off duty pay, or what the LEDBETTER ACT refers to as "wages, benefits, or other compensation." These losses occurred post-waiver and accrued and affected them with each

paycheck and more specifically, as of the date they had to leave their employment with the City.

The courts below and specifically, the Eleventh Circuit, construed the LEDBETTER ACT in a manner inconsistent with its text and self-evident purpose. Given the significance of this provision to the many DROP plans which are in place throughout the State of Florida in the public sector, this Court should grant review.

III. REVIEW WILL PROVIDE COURTS GUIDANCE IN DETERMINING THE THRESHOLD OF EVIDENCE NECESSARY TO CREATE A TRIABLE QUESTION OF FACT UNDER *KENTUCKY RETIREMENT SYSTEMS* REGARDING WHETHER A PENSION PLAN'S AGE COMPONENT IS A PROXY FOR AGE DISCRIMINATION

In this case, the district court held, and the Eleventh Circuit affirmed, that the Petitioners' receipt of less lucrative retirement benefits was not because of their age, but rather because of "their pension status." Pet. App. 40a-42a. However, Petitioners submit that the DROP plan on its face is discriminatory by virtue of its age component which discriminates against officers aged 45 or older who reach their 20 year anniversary with the department. This class of officers receives less benefits than younger officers who reach their 20 year anniversary at age 41 or younger. Petitioners submit that it is age

and age alone, not the pension that causes this disparity.

In *Kentucky Retirement Systems v. EEOC*, ___ U.S. ___, 128 S.Ct. 2361 (2008), this Court held that Kentucky's disability retirement system did not violate the ADEA, even though age was an explicit factor in calculating benefits for at least some workers. This Court concluded that Kentucky's system was not "actually motivated" by bias against older workers but was instead organized around the "analytically distinct" concept of "pension status." *Id.* at 2366. This Court further held that when a retirement plan conditions pension eligibility on age but then discriminates on the basis of pension status, an ADEA plaintiff must show that the disparate treatment was "actually motivated" by age itself rather than pension status. The Court's opinion relied heavily on its 1993 ruling in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), which held that discrimination based on pension status would not violate the ADEA unless it was being used as a "proxy for age." Applying *Hazen Paper*, this Court's majority identified a "clear non-age-related rationale" for the disparities in Kentucky's disability retirement plan: providing benefits for workers at the level they would have received had they become disabled after reaching eligibility for normal retirement benefits. *Id.* at 2388. The majority said the fact that older disabled workers may receive fewer imputed years of service than younger disabled workers results not from age discrimination in the plan itself, but rather because

employers may lawfully condition pension eligibility on age. This is evident by looking at the pension scheme as a whole, which "the ADEA treats somewhat more flexibly and leniently in respect to age." *Id.* at 2367. This Court further noted that Kentucky's system "does not rely on any of the stereotypical assumptions that the ADEA sought to eradicate." *Id.* at 2369. One other factor cited by the majority was the high cost of remedying any potential age disparity, which it viewed as evidence that the disability benefit calculations were motivated primarily by financial considerations rather than by improper age bias. Pooling together all of these factors, this Court concluded that Kentucky's disability retirement plan did not use pension status as a "proxy for age" under *Hazen Paper*. *Id.* at 2367-71.

What this Court did not address in the *Kentucky* case was the level of evidence a plaintiff needed to proffer so as to create a triable issue of fact as to whether a pension's age requirement was a proxy for age motivated by age bias. In the instant case, both the district court and the Eleventh Circuit disregarded the impact of the testimony evidence of age bias by the City motivating the City's decision to keep the age requirement in the DROP plan. Such evidence is clear by the testimony of Detective Thomas Mangifesta, President of the police union who testified regarding the negotiations that resulted in the 2000 Collective Bargaining Agreement. Detective Mangifesta testified that although FOP proposed alternative DROP arrangements where age was not a

factor, the City always insisted that age remain as a component. Pet. App. 15a-16a. Additionally, Detective Mangifesta testified that when he asked the City's Employee Relations Director and chief negotiator M. Scott Melinski why the City so insisted, Melinski responded that "[the City] wanted senior officers to retire as soon as possible." *Id.*

The statements attributed to the City clearly show that the age component to the DROP is nothing more than a pretext for age discrimination to get the older officers to retire as soon as possible. Petitioners submit that this evidence, while circumstantial evidence of age bias, should be sufficient to satisfy the age-plus-intent requirement promulgated by this Court in the *Kentucky Retirement* case. Despite this, and despite the Mangifesta testimony, the district erred in its holding that there was no evidence whatsoever of age bias so as to require a trial.

Having years of service eligibility only would have treated everyone the same regardless of age. It would likewise have required those reaching the age of service eligibility to decide then and there if they wanted to enter into the DROP. With a year of service requirement, the City would still have an early retirement incentive package which would not discriminate against the older more senior officers. Likewise, DROP eligibility could have been conditioned on years of service and age so long as the benefits did not decline with each month that passed after the officer became DROP eligible. However, in the City's plan, by including the age requirement,

younger employees are afforded more time to accrue a higher pension retirement percentage than an older employee with equal years of service *solely because of age*. For example: if a police officer turns 40 at his 20 year anniversary with the department, by the time he is eligible for the DROP plan, at age 45, he will have accrued a maximum pension retirement percentage of 81% (3.38% x 24 years) of his salary and he will also be able to reap the benefit of a full 60 month DROP plan. However, in the case of an officer who is 45 or older at his 20 year anniversary, he would be faced with the dilemma of entering the DROP plan with a pension retirement percentage of 67.5% of his salary and retiring in 5 years, or he could bypass the DROP altogether and continue to work for 4 more years where he could then max out his retirement at 81% at age 49, but only have 12 months of DROP and retirement in one year. Thus, the challenged DROP plan penalizes officers solely because of their age.

The Eleventh Circuit never addressed the Mangifesta evidence square on, as it concluded that the Petitioners had waived their right to challenge the DROP plan. Nonetheless, the question remains unanswered whether circumstantial evidence such as that offered in this case, (i.e., that the City insisted on having an age requirement in the DROP plan to get the older officers to retire as soon as possible), is sufficient to create a genuine issue of material fact as to whether the age requirement in the retirement plan was inserted because of some unlawful motivation or some legitimate business purpose. Once

again, given the significance of this provision to the many DROP plans which are in place throughout the State of Florida in the public sector, this Court should grant review.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

MICHAEL A. PANCIER
LAW OFFICES OF
MICHAEL A. PANCIER, P.A.
9000 Sheridan Street
Suite 96
Pembroke Pines, FL 33024
Tel: 954-862-2217
Email:
mpancier@pancierlaw.com

Attorney for Petitioners

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 09-10420

D. C. Docket No. 02-60967-CV-WJZ

STEVEN LERMAN,
JAMES TOWNSEND,
STEVE HOLT,
DAVID ECKLUND,
JAMES GAUGHAN,
TIMOTHY FALK,
FRANK DEL RIO,
FRED ROSS,
DAVID NICKERSON,
JIM WIGAND,
SAM WERNICK,
STEPHEN MEDLEY,
LAWRENCE LOSHEN,

Plaintiffs-Appellants,

STEPHEN LITTLEFIELD,

Plaintiff,

versus

CITY OF FORT LAUDERDALE, FL,
a political subdivision of the State of Florida,
CITY OF FORT LAUDERDALE POLICE OFFICERS'
AND FIREFIGHTERS' RETIREMENT BOARD,

Defendants-Appellees,

FRATERNAL ORDER OF POLICE LODGE 31,

Defendant.

Appeal from the United States District Court
for the Southern District of Florida

(September 28, 2009)

Before BARKETT and HULL, Circuit Judges, and QUIST,* District Judge.

PER CURIAM:

Steven Lerman and twelve other police officers ("Police Officers") appeal from an adverse summary judgment in favor of the City of Fort Lauderdale and the Police Officers' and Firefighters' Retirement Board. The Police Officers sued the City claiming a violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. (2009) ("ADEA"), and the Florida Civil Rights Act of 1992, Florida Statutes § 760.10 (2008). The Police Officers' claim concerns an early retirement incentive program that the City implemented following collective bargaining negotiations between it and the Officers' Union. The retirement plan at issue, the Deferred Retirement Option Program ("DROP"), is a voluntary early retirement program by which a Police Officer who elects to

---

* Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

participate can earn early retirement benefits while continuing to work and draw a regular salary. However, in order to participate in these additional benefits, the officer has to submit an irrevocable letter of resignation to take effect at the termination of the DROP period for that employee and execute an "Acknowledgment, Waiver And Release Agreement" releasing all claims against the City pertaining to the program and its benefits. All of the Officers except James Gaughan, who never entered DROP, executed this Waiver which provides:

> In consideration for allowing me to participate in and derive the benefits of the DROP, to which I acknowledge I would not otherwise be entitled and which I have freely and voluntarily elected, I hereby release and discharge the City of Fort Lauderdale, Florida . . . from all claims, liabilities, demands and causes of action, whether known or unknown, fixed or contingent, which I may have or claim to have against the City . . . as a result of my employment with the City; including but not limited to my election to participate in the DROP and to voluntarily resign and retire on the date specified in my letter of resignation. I hereby promise not to file a lawsuit. . . . This Waiver includes, but is not limited to, claims and liability under . . . employment discrimination laws such as the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621, et seq.), . . . [and] the Florida Civil Rights Act of 1992. . . .

The Officers do not contend on appeal that this waiver was not knowing and voluntary as required under the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f)(1)(A-H) (2009). Rather, they essentially argue that an employee cannot waive his or her rights under the ADEA. They contend that this view is reinforced by the passage of the Lilly Ledbetter Fair Pay Act ("LLFPA").

Having reviewed the record, we find no error in the district court's determination that on this record, the waiver at issue was knowing and voluntary and that an employee can waive his or her ADEA rights. *See, e.g., Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426-7 (1998) (holding that an employee may waive ADEA rights if the waiver complies with the OWBPA); *Lloyd v. Brunswick Corp.*, 180 F.3d 893, 895 (7th Cir. 1999) ("Employees are free to waive their ADEA rights.") (citation omitted).

Moreover, we reject the Officers' argument that the LLFPA somehow precludes application of the waivers they validly executed. The LLFPA was passed in response to the Supreme Court's decision in *Lilly Ledbetter v. Goodyear Tire & Rubber, Co.*, 550 U.S. 618 (2007), which involved the statute of limitations in pay discrimination cases. We find the LLFPA inapplicable in this case and affirm the district court's ruling that the Officers, other than Gaughan, validly waived their rights under the ADEA.

As to Gaughan, the district court found on the merits that the DROP plan was not discriminatory because the Police Officers had not shown that age "actually motivated" the City's decisions, *see Ky. Ret. Sys. v. E.E.O.C.*, 128 S. Ct. 2361, 2366 (2008), and, even if it were, that the plan would be permitted under the safe harbor provision of the ADEA, 29 U.S.C. § 623(f)(2)(B)(ii). Having considered the arguments of the parties, we find no error in these determinations.

AFFIRMED.

2008 WL 5378127

United States District Court,
S.D. Florida.
Steven LERMAN, James Townsend, Steve Holt, David Ecklund, James Gaughen, Timothy Falk, Frank Del Rio, Fred Ross, David Nickerson, Stephen Littlefield, Jim Wigand, Sam Wernick, Stephen Medley, and Lawrence Lohsen, Plaintiffs,
v.
CITY OF FORT LAUDERDALE, FLORIDA, and City of Fort Lauderdale Police Officers' & Firefighters' Retirement Board, Defendants.
No. 02-60967-CIV.

Dec. 23, 2008.

* * *

ORDER

WILLIAM J. ZLOCH, District Judge.

THIS MATTER is before the Court upon Defendant City of Fort Lauderdale's Motion For Summary Judgment (DE 173) and Plaintiffs' Renewed Cross Motion For Partial Summary Judgment As To Liability (DE 181).[1] The Court has carefully reviewed

---

[1] Defendant City of Fort Lauderdale Police Officers' & Firefighters' Retirement Board previously advised the Court that it entered into a stipulation with Plaintiffs in which it conceded the Court's jurisdiction and agreed to "comply with any relief that may be ordered by the Court." *See* DE 91. Therefore, this Order shall bind said Defendant in accordance with the stipulation.

said Motions and the entire court file and is otherwise fully advised in the premises.

I. *Background*

Plaintiffs, current and former police officers employed by Defendant the City of Fort Lauderdale, initiated the above-styled cause with the filing of their Complaint (DE 1, Ex. A) in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida. Therein, Plaintiffs alleged claims under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* (2006) (hereinafter "ADEA"), and the Florida Civil Rights Act of 1992, Florida Statutes § 760.10 (2008). The original Complaint stated claims against Defendant the City of Fort Lauderdale, Florida (hereinafter the "City") and the Fraternal Order of Police Lodge 31 (hereinafter "FOP"), which is the bargaining agent for the City of Fort Lauderdale Police Department (hereinafter "FLPD"). *See* DE 1, Ex. A, ¶ 103. Subsequently, Plaintiffs filed an Amended Complaint (DE 15) and a Second Amended Complaint (DE 26) (hereinafter "Complaint"), which stated an additional claim for Declaratory and Injunctive Relief against an added Defendant the City of Fort Lauderdale Police Officers' & Firefighters' Retirement Board (hereinafter the "Retirement Board"). Plaintiffs and FOP subsequently filed a Joint Stipulation For Voluntary Dismissal With Prejudice As To Defendant FOP (DE 40), and an Order dismissing FOP was entered by

United States District Judge William P. Dimitrouleas.[2] *See* DE 48.

Plaintiffs' claims concern an early retirement incentive program the City implemented following collective bargaining negotiations between it and FOP. Prior to implementing the program at issue, police officers were eligible for "normal retirement" after having reached 20 years of service and 47 years of age. Effective October 1, 1997, officers were eligible for retirement after 20 years of service regardless of age. Once an officer retired, the officer would cease employment and begin collecting a pension.[3] DE 66, ¶ 2. Under the pension plan, the amount an officer collects under normal retirement is a function of the officer's years of service multiplied by an accrual rate, and that amount is then multiplied by the monthly average of the officer's pensionable salary from the two highest years of service. DE 51, Ex. 16, ¶ 4.

The accrual rate is a recurring topic of negotiations between the City and FOP, and often varies from one collectively bargained agreement to the next. For example, prior to October 1, 1997, each officer's pension amount accrued at 3% per year for the first 20 years of service, and at 2% each year after

---

[2] Judge Dimitrouleas subsequently entered a Notice Of Recusal, and the above-styled cause was reassigned to the undersigned. *See* DE 71.

[3] All facts recited are undisputed unless otherwise indicated.

that up to a maximum accrual rate of 75%. DE 66, ¶ 3, n. 2. Under the next agreement, effective from October 1, 1997, until September 30, 2000, (hereinafter the "1997 Agreement"), each officer's pension amount accrued at a rate of 3% each year, up to a maximum accrual rate of 81%. DE 66, ¶ 3. Under the 1997 Agreement, an officer needed to complete 27 years of service in order to achieve the maximum accrual rate of 81%. In the agreement that followed, effective beginning October 1, 2000 (hereinafter the "2000 Agreement"), the City and FOP contracted for an accrual rate of 3.38% for each year of service, maintaining a maximum accrual rate of 81%. *Id.* at ¶ 4. Because of the increased accrual rate, an officer was able to reach the maximum accrual rate with only 24 years of service. *Id.* Additionally, if an officer had already reached the maximum accrual rate of 81% at the time of the 2000 Agreement, said Agreement allowed an additional accrual rate increase of up to 91.26%. *Id.* This benefit effected half of Plaintiffs in the above-styled cause, namely David Ecklund (90.4%), Timothy Falk (83.3%), James Gaughen (91.26%), Stephen Medley (84.3%), David Nickerson (85.1%), Sam Wernick (91.26%), and Jim Wigand (90.4%).

On October 15, 1996, as the result of negotiations with FOP, the City implemented the retirement plan at issue, namely the Deferred Retirement Option Program (hereinafter "DROP"). Set to become effective March 1, 1997, officers became eligible for DROP upon reaching 20 years of service and 47 years of age.

DE 51, Ex. 15, ¶ 9. Upon becoming eligible, an officer remained eligible for DROP for 36 months. *Id.* If he or she elected to enter DROP, the officer submitted an irrevocable letter of resignation, and signed a document entitled "City Of Fort Lauderdale Deferred Retirement Option Program OWBPA Acknowledgment, Waiver And Release Agreement."[4] This election established the officer as retired in the sense that he or she no longer accrued additional years of service credit towards normal retirement. *Id.* at ¶ 7. However, the officer continued to work while receiving regular pay and benefits. More importantly, the officer received the normal monthly pension payments he or she was eligible for, but such payments were made into a separate interest bearing account. *Id.* At the end of the DROP period, the officer ceased employment, and, at the officer's discretion, received the amount in the aforementioned account in one lump sum, or by rolling it over into another tax-qualified retirement plan. *Id.*

Although an officer was able to enter DROP any time during the 36 months following his or her first date of eligibility, the period of DROP participation was measured from the first date of eligibility. DE 66, ¶ 7. In other words, every month that an officer

---

[4] "OWBPA" refers to the Older Workers' Benefit Protection Act of 1990, 29 U.S.C. § 626(f)(1)(A)-(H) (2006) (hereinafter "OWBPA"), which amended various provisions of the ADEA. OWBPA sets forth the requirements for a waiver of an employee's rights under the ADEA.

delayed entering DROP upon reaching eligibility was a month that the officer would not be eligible to participate in DROP. If an officer waited 24 months after initial eligibility to enter DROP, he was only entitled to participate in DROP for 12 months.

In addition to modifying the terms of normal retirement, the 2000 Agreement also amended the terms of DROP, which became effective October 1, 2000. First, the period of possible DROP participation was extended from 36 months to 60 months. Additionally, the age component of DROP was lowered from 47 years of age to 45 years of age. DE 66, ¶ 9. While the years of service component remained the same, officers were made eligible for DROP upon reaching 20 years of service regardless of age. *Id.* However, an officer did not begin to lose time from his DROP participation period upon simple attainment of 20 years of service. Rather, the clock only began to run in a manner that shortened the DROP period upon the attainment of *both* 20 years of service and 45 years of age. *Id.*

With one exception discussed below, the 2000 Agreement's modifications to DROP did not change the initial eligibility dates of those officers who became eligible for the program prior to the amendment's effective date. Said Agreement did, however, give DROP-eligible or DROP-enrolled officers the benefit of the 24 extra months and the increased multiplier that had been negotiated. Specifically, there were 12 officers who became DROP eligible prior to October 1, 2000, and elected to enter DROP.

DE 61, ¶ 16. Those officers' DROP period was extended for an additional 24 months, DE 66, ¶ 10, and they were given the benefit of the negotiated increased multiplier percentage. DE 61, ¶ 16. Officers who became DROP eligible prior to the new effective date and opted not to enroll, and whose period of DROP eligibility had not closed, had 24 months added to whatever period of DROP eligibility remained. DE 66, ¶ 10. One exception to the rule that officers did not have their eligibility date changed was made for officers who had become DROP eligible prior to October 1, 2000, had elected not to enter DROP, and whose 36-month DROP eligibility period had passed. These officers were given an additional opportunity to enroll in DROP for 17 months. *Id.*

II. *Standard of Review*

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate

> if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.

Fed.R.Civ.P. 56(c); *see also Eberhardt v. Waters,* 901 F.2d 1578, 1580 (11th Cir.1990). The party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quotation omitted). Indeed,

> the moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment.

Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir.1991); *Avirgan v. Hull,* 932 F.2d 1572, 1577 (11th Cir.1991).

The moving party is entitled to "judgment as a matter of law" when the non-moving party fails to make a sufficient showing of an essential element of the case to which the non-moving party has the burden of proof. *Celotex Corp.,* 477 U.S. at 322; *Everett v. Napper,* 833 F.2d 1507, 1510 (11th Cir.1987). Further, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III. *Analysis*

The City's Motion For Summary Judgment (DE 173) asserts numerous arguments and the Court will address them in the following order. First, the City argues that they are entitled to summary judgment because each of the Plaintiffs, with the exception of James Gaughen, knowingly and voluntarily signed a waiver releasing the City from liability under the exact claims Plaintiffs now assert. Second, the City argues that even if Plaintiffs are allowed to assert their claims despite signing a waiver, that DROP is not discriminatory, or alternatively is lawful under the ADEA's safe harbor provision for early retirement incentive programs. Third, the City argues that Plaintiffs' claims are time barred and that Plaintiffs failed to exhaust their administrative remedies. Finally, the City asserts sundry catch-all arguments addressing Plaintiffs' claims.

Plaintiffs filed a Cross Motion For Partial Summary Judgment As To Liability (DE 181). In said Motion, Plaintiffs' argument is threefold: 1) DROP is discriminatory on its face, 2) the waiver is invalid because DROP is discriminatory and constitutes an ongoing violation of the ADEA, 3) DROP has a disparate impact on them.

The thrust of Plaintiffs' Complaint is that DROP violates the ADEA and the FCRA by discriminating against certain police officers solely on the basis of their age.

Plaintiffs argue that younger police officers have an opportunity to attain the maximum pension accrual rate of 81%, and then enter DROP for the full 60 months, thereby accruing the full benefit obtainable under DROP. Plaintiffs argue they are faced with the following Hobson's choice: 1) enter DROP for a full term of 60 months, but with a reduced pension benefit accrual rate; or 2) work long enough to attain the maximum pension accrual rate of 81%, and then enroll in DROP if they still have a term of eligibility. DE 67, p. 3. Under either scenario, Plaintiffs argue, older officers stand to lose a significant amount of money. Plaintiffs further assert that because of the financial ramifications of not entering DROP when initially eligible, the supposed voluntariness of the program is illusory. DE 61, ¶ 6. Regarding the 2000 Agreement, Plaintiffs argue that the City discriminated against them by not giving those who elected not to enter DROP prior to its implementation the opportunity to enter DROP for a full 60 months, while it gave those who did elect to DROP the additional benefits provided for in the 2000 Agreement. *Id.* ¶ 13.

While Plaintiffs argue that the aforementioned facts establish that DROP was facially discriminatory, they further assert that other evidence exists to establish the City's discriminatory intent with regards to the plan. First, Plaintiffs point to the testimony of Detective Thomas Mangifesta, President of FOP who testified regarding the negotiations that resulted in the 2000 Agreement. Detective Mangifesta

testified that although FOP proposed alternative DROP arrangements where age was not a factor, the City always insisted that age remain as a component. DE 60, Ex. A, p. 15. Additionally, Detective Mangifesta testified that when he asked the City's Employee Relations Director and chief negotiator M. Scott Melinski why the City so insisted, Melinski responded that "[the City] wanted senior officers to retire as soon as possible." *Id.* p. 16. Finally, two of the Plaintiffs were told by a member of the FOP that the City wanted to "get rid of" officers described as "old farts." DE 51, Ex. 4, p. 59; Ex. 10, p. 27. The City filed a Supplemental Concise Statement Of Undisputed Facts (DE 154) in which it asserts that it "intended DROP to serve as an early retirement incentive plan designed to encourage highly compensated police officers of long-standing seniority to retire earlier than they otherwise would if they so desired." DE 154, ¶ 1. The Court will begin by addressing the validity of the Waivers executed by all Plaintiffs except James Gaughen and then will proceed to analyze whether DROP is discriminatory.

A. *Waiver of Plaintiffs' Claims*

All Plaintiffs except James Gaughen, who never entered DROP, executed a document entitled "City Of Fort Lauderdale Deferred Retirement Option Program OWBPA Acknowledgment, Waiver And Release Agreement" (hereinafter the "Waiver") upon deciding

to enter DROP.[5] Each waiver includes, in pertinent part, the following language:

> In consideration for allowing me to participate in and derive the benefits of the DROP, to which I acknowledge I would not otherwise be entitled and which I have freely and voluntarily elected, I hereby release and discharge the City of Fort Lauderdale, Florida . . . from all claims, liabilities, demands and causes of action, whether known or unknown, fixed or contingent, which I may have or claim to have against the City . . . as a result of my employment with the City; including but not limited to my election to participate in the DROP and to voluntarily resign and retire on the date specified in my letter of resignation. I hereby promise not to file a lawsuit. . . . This Waiver includes, but is not limited to, claims and liability under . . . employment discrimination laws such as the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621, et seq.), . . . [and] the Florida Civil Rights Act of 1992. . . .
>
> Waiver, ¶ 1. Thus, the terms of the Waiver, if valid, expressly bar Plaintiffs' claims in this case.

---

[5] *See* DE 51, Ex. 1, pp. 84-85; Ex. 2, Doc. 158; Ex. 3, Doc. 92; Ex. 5, Doc. 64; Ex. 6, Doc. 142; Ex. 7, Doc. 76; Ex. 8, Doc. 186; Ex. 9, Doc. 105; Ex. 10, Doc. 124; Ex. 11, Doc. 197; Ex. 12, Doc. 21; Ex. 13, Doc. 37; Ex. 14, Doc. 173.

While waivers like the one quoted above are permissible, by its enactment of OWBPA, "Congress [has] imposed specific duties on employers who seek releases of certain claims created by [the ADEA]." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998). Under OWBPA, an employee may not waive his or her rights under the ADEA unless the waiver is given knowingly and voluntarily. A waiver of those rights will not be considered knowing and voluntary unless at a minimum

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job

> classification or organizational unit who are not eligible or selected for the program.

29 U.S.C. § 626(f)(1)(A)-(H) (2006). This provision makes clear that an employee may waive his rights under the ADEA, and this principle has been reaffirmed by courts on numerous occasions. *See, e.g., Oubre,* 522 U.S. at 424; *Lloyd v. Brunswick Corp.,* 180 F.3d 893, 895 (7th Cir.1999) ("Employees are free to waive their ADEA rights.") (citation omitted).

Plaintiffs fail to offer any argument as to whether the Waiver complies with OWBPA requirements. Instead, Plaintiffs argue that the Waiver is valid only if the City's retirement plan is valid under the ADEA. In essence, Plaintiffs argue that it is impossible for an employee to waive his right to sue for an ADEA violation. Plaintiffs are mistaken. *Oubre,* 522 U.S. at 424. If Plaintiffs were correct, OWBPA would be meaningless. In fact, the very purpose of OWBPA is to establish the ground rules for employers seeking "releases of certain claims created by [the ADEA]." *Id.* at 427.

Thus, the Waiver's validity must be assessed without reference to the validity of DROP. If the Waiver is valid, then summary judgment must be granted with respect to all claims except Gaughen's.

1. *Language*[6]

The Waiver is a mere three pages of actual text, with a fourth page to be notarized. Those pages include nine paragraphs, and each paragraph addresses a single topic. The language used in the Waiver is not complicated. It is written in plain English and does not use legelese. Also, just a few lines above where Plaintiffs signed their name, the Waiver states "I have read and I fully understand this Waiver." Waiver, ¶ 8. Accordingly, the Court finds that the Waiver is written in language calculated to be understood by the average police officer.

Furthermore, each Plaintiff who was asked during his respective deposition whether he understood the Waiver when he signed it answered in the affirmative.[7] While not everyone was asked this question, each of the Plaintiffs who was asked said he understood it. The closest thing to an objection regarding the difficulty of the language used was a statement by Frank Del Rio who wished someone from FOP had "actually come and explain[ed] the DROP plan to [him] in layman's terms, not hand [him] a book." *Id.*, Ex. 1, p. 86. Del Rio's statement, however, expresses a desire to have DROP explained to him, not the Waiver. Accordingly, based upon the Court's review of the language used in the Waiver, as

---

[6] These sections will track the order of the OWBPA statute.

[7] *See* DE 51, Ex. 2, p. 57; Ex. 3, p. 40; Ex. 6, p. 67; Ex. 10, p. 55; Ex. 12, p. 32.

well as statements by several Plaintiffs that they understood the Waiver, and the lack of any objections to the difficultly of its language, the Court finds that the Waiver satisfies Section (A) of the OWBPA waiver requirements.

2. *Reference to the ADEA*

The Court notes that Paragraph 1 of the Waiver expressly references not only the ADEA, as required by OWBPA, but also the FCRA. Accordingly, the Court finds that Paragraph 1 of the Waiver satisfies Section (B) of the OWBPA waiver requirements.

3. *Prospective Claims*

A waiver will not satisfy OWBPA if it attempts to waive claims arising after it is signed. Plaintiffs argue that their claims arose after they signed the Waiver because the City maintains a discriminatory policy that constitutes a continuing violation. DE 67, p. 18. The City argues that Plaintiffs' cause of action accrued at the time DROP was enacted, which was prior to the signing of any Waiver.

In support of their position, Plaintiffs cite *Snair v. City of Clearwater,* 787 F.Supp. 1401 (M.D.Fla.1992) and *Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). However, both of these cases address when a statute of limitations begins to run in order to determine the last date that a plaintiff can bring his claims. Neither

of these cases address when a cause of action arises for the purpose of an OWBPA waiver agreement.

To answer the question before the Court, it is not proper to focus on the time of the discriminatory action, but the time at which Plaintiffs "knew or should have known of [their] injury and its cause." *White v. Mercury Marine, Div. of Brunswick, Inc.*, 129 F.3d 1428, 1435 (11th Cir.1997). "A claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an injury." *Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1386 (3d Cir.1994); *see also Ricks,* 449 U.S. at 258 (holding that the discriminatory action occurred when the unlawful "tenure decision was made *and communicated* to Ricks") (emphasis added); *White,* 129 F.3d at 1434 (noting that "the Supreme Court has held that courts should use the discovery rule to determine when a cause of action accrues").

Applying the discovery rule, Plaintiffs' causes of action did not arise after they executed the Waiver. In fact, certain Plaintiffs' deposition testimony confirmed that they believed they were being discriminated against because of their age when they executed the Waiver. *See, e.g.,* DE 51, Ex. 1, pp. 86-87; Ex. 11, p. 35. Not only did they know of the existence of this alleged injury, but they were aware of its source – the DROP program. *Id.* Accordingly, the Court finds that the causes of action asserted in the above-styled cause did not arise after execution of the

Waiver, and Plaintiffs did not waive claims arising after its execution.

4. *New Consideration*

Paragraph 1 of the Waiver states that the same is being signed in exchange for being allowed to participate in and derive the benefits of DROP. Waiver, ¶ 1. Additionally, that Paragraph states that the person executing the Waiver "would not otherwise be entitled" to those benefits. *Id.* Plaintiffs have failed to offer evidence tending to show that Plaintiffs were already entitled to DROP benefits prior to executing the Waiver. Accordingly, the Court finds that Plaintiffs waived their claims in exchange for consideration.

5. *Advice to Consult an Attorney*

In Paragraph 5 of the Waiver, the signer acknowledges that he was encouraged to consult with an attorney and a professional tax advisor before signing it. Waiver, ¶ 5. Plaintiffs have failed to present evidence tending to show that they were not so advised. Accordingly, the Court finds that Plaintiffs were advised in writing to consult with an attorney prior to executing the Waiver.

6. *45 Days to Consider*

In Paragraph 6 of the Waiver, the signer acknowledges that he was given no less than 45 days

to consider the same, and that he was aware that he could use all or any part of that period. Plaintiffs have failed to offer evidence that would contradict this acknowledgment. Therefore, the Court finds that Plaintiffs were given at least 45 days to consider the Waiver.

7. *7 Days to Revoke*

In Paragraph 7 of the Waiver, the signer acknowledges that he has been informed that he has 7 days from the date he executes the Waiver in which to revoke it, and that the Waiver does not become enforceable until those 7 days pass. Plaintiffs have failed to demonstrate a genuine issue of material facts as to whether they were not aware of or were not afforded the 7-day revocation period. Furthermore, various Plaintiffs agreed that the admonition to seek legal counsel, the 45-day period for reflection, and the 7-day revocation period, were in fact part of the terms of their agreement with the City as reflected in the Waiver, as required by OWBPA. *See, e.g.*, DE 51, Ex. Nos. 1-3, 5-14. Thus, the Court finds that the Waiver provided Plaintiffs with at least 7 days following execution to revoke the same, and the Waiver was not enforceable until that period expired.

8. *Coverage, Terms, and Eligibility of DROP*

In addition to being provided with a Waiver upon Plaintiffs' decision to enter DROP, they were each provided with an Information Sheet and Election

Form (hereinafter the "Election Form").[8] The Court finds that the information given in the Election Form satisfies § 626(f)(1)(H). Because Plaintiffs have failed to provide evidence rebutting that they were properly notified, the Court finds that the Election Form satisfies the terms of Section (H) of the OWBPA waiver requirements.

Based on the forgoing, the Court finds that there exists no genuine issue of material fact regarding the Waiver's satisfaction of the requirements for a waiver of ADEA rights pursuant to § 626(f)(1)(A)-(H). Accordingly, the Court finds that each of the Plaintiffs, with the exception of James Gaughen, signed Waivers that satisfy the requirements of OWBPA for a knowing and voluntary waiver of claims under the ADEA.

B. *Other Arguments Against Enforcement of the Waiver*

Having found that the Waiver in question passes OWBPA scrutiny, the Court now turns to Plaintiffs' arguments against the enforcement of the Waiver. First, Plaintiffs argue that the Waiver is invalid because such a waiver is only enforceable if the plan it is attached to passes ADEA scrutiny. Second,

---

[8] *See* DE 51, Ex. 1, Doc. 4; Ex. 2, Doc. 157; Ex. 3, Doc. 91; Ex. 5, Doc. 63; Ex. 6, Doc. 140; Ex. 7, Doc. 75; Ex. 8, Doc. 185; Ex. 9, Doc. 104; Ex. 10, Doc. 123; Ex. 11, Doc. 196; Ex. 12, Doc. 20; Ex. 13, Doc. 36; Ex. 14, Doc. 172.

Plaintiffs argue that Waiver has been applied arbitrarily and thus should not constrain them from pursuing claims otherwise released by the Waiver. Third, Plaintiffs rebut Defendant's argument that Plaintiffs' claims should fail because they have failed to tender back the money received through DROP.

First, Plaintiffs argue that because the Waiver at issue here is tied to DROP, a plan Plaintiffs allege discriminates against them in violation of the ADEA, the Waiver amounts to nothing more than an illegal contract, and it is void *ab initio*. Plaintiffs' argument fails as a matter of law. The promise Plaintiffs seek to bar enforcement of is their own promise not to bring the very claims they are now bringing against the City. Plaintiffs certainly are not seeking to prevent the enforcement of the City's promise to pay them the hundreds of thousands of dollars they are collectively owed under DROP. See DE 66, ¶¶ 17-30. Plaintiffs' Waiver is not only legal, but also, it is expressly allowed under OWBPA and has been expressly allowed by numerous courts. *See, e.g., Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S.Ct. 838, 139 L.Ed.2d 849 (1998); *Lloyd v. Brunswick Corp.*, 180 F.3d 893, 895 (7th Cir.1999).

Plaintiffs' argument that the Waiver must be found invalid if DROP violates the ADEA defies logic. If DROP had to pass ADEA scrutiny in order for the Waiver to be valid, it is difficult to imagine the utility of such a waiver. Furthermore, Plaintiffs would have provided no consideration to the City in return for the benefits of entering DROP, but rather, they would

have simply waived their right to bring frivolous claims. The Court therefore finds that the issue of DROP's lawfulness under the ADEA has no bearing on the enforceability of the Waiver signed by Plaintiffs.

Second, Plaintiffs argue that the City has inconsistently enforced the Waiver and only seeks to assert it against officers bringing claims of age discrimination. This argument arises from two different factual scenarios. First, an officer named Alan Stone entered DROP in 2000, and was not required to execute a Waiver at that time. *See* DE 60, Ex. E.[9] Second, Plaintiffs point to the officers who had already enrolled in DROP at the time of the 2000 Agreement but received the benefits of the extended DROP period and extended multiplier. According to Plaintiffs, this shows inconsistency in enforcement because the aforementioned officers received those benefits despite having signed the Waiver, and

---

[9] Plaintiffs also point to the deposition testimony of Detective Mangifesta who stated that other officers signed up for DROP without executing a waiver. *See* DE 60, Ex. A, p 26. Mangifesta further stated that he could not give the names of these officers, and could not recall who they were. As noted above, however, "mere allegations" such as these, without further documentation establishing specific facts, do not create a genuine issue for trial. *L.S.T., Inc. v. Crow*, 49 F.3d 679, 684 (11th Cir.1995).

entered DROP, which normally freezes one's benefits because the officer is considered retired.[10]

The Court begins by noting that the facts set forth in favor of this argument are not disputed. More important, however, is the fact that Plaintiffs do not articulate any legal theory under which these facts would render the Waiver unenforceable against them. It appears that Plaintiffs are arguing that having not enforced the Waiver against other parties, the City should be estopped from enforcing it against them. The Court notes that "[e]quitable estoppel precludes a person from maintaining a position inconsistent with another position . . . which was asserted at a previous time." *Bailey v. State Farm Mut. Auto. Ins. Co.*, 789 So.2d 1181, 1183 (Fla.Dist.Ct.App.2001).

However, it is axiomatic that for an argument of equitable estoppel to be successful, the inconsistent conduct must have caused prejudice to someone who acted in reliance on the prior conduct. *Id.* Plaintiffs have presented no evidence that would establish that they signed the Waiver expecting it not to be enforced against them, or that those who entered DROP prior

---

[10] It is worth noting that according to Detective Mangifesta, the City originally did not want to extend additional benefits to these officers for the very reasons set forth by Plaintiffs above. DE 60, Ex. A, p. 17. The City apparently changed its mind during negotiations, however, when FOP argued that "as long as somebody was putting on a gun belt and going out and putting your life on the line every day, they were not retired, they were still working." *Id.*

to the 2000 Agreement received extra benefits as a result thereof. Further, the mere fact that Alan Stone never signed a Waiver has no bearing on whether a person who signed the Waiver would be bound by it. Accordingly, drawing all possible inferences from the above facts in favor of Plaintiffs, there is no legal theory under which these facts result in non-enforcement of the Waiver.

Even if it is later determined that the an estoppel theory is applicable in the above-styled cause, the Court finds that the record does not support a finding that the Waiver has been inconsistently enforced by the City. Regarding Alan Stone, Plaintiffs support their argument by presenting an Affidavit wherein Stone states that he has entered DROP, and that he has not signed a Waiver. DE 60, Ex. E. Stone does not say why he did not sign a Waiver, and no explanation appears elsewhere in the record. The City responded by filing the Affidavit of John Panoch, Personnel Director of the City of Fort Lauderdale. DE 65, Ex. A. Panoch states that "[i]n the course of discovery in this case, it came to my attention that Al Stone . . . failed to provide me with the mandatory executed waiver of rights form at the time he was admitted into the DROP plan." *See* DE 65, Ex. A, pp. 2-3. Further, the City made no exception for Stone from this requirement of every officer entering DROP. Panoch also stated that the failure to collect Stone's Waiver was due to inadvertence, and that steps were being taken to remedy the oversight. *Id.* Because this is the only explanation in the record as to why Stone did not

sign a Waiver, the Court finds that there is no support for the proposition that the City was inconsistently enforcing the Waiver.

Additionally, the extension of benefits to those in DROP at the time of the 2000 Agreement does not implicate the Waiver at all. Those officers who signed a Waiver before the 2000 Agreement did not sue or threaten to sue for increased benefits. Rather, they received the additional benefits as a result of negotiations between the City and FOP. Thus, there are no facts sufficient to create a genuine issue regarding any inconsistent application of the Waiver by the City.

Finally, Plaintiffs argue that their execution of the Waiver was not voluntary because they had to execute the document to enter DROP, and DROP was too economically advantageous to pass up.[11] Notwithstanding comments like these, during their depositions, Plaintiffs conceded that they were not forced to sign the Waiver under threat of physical, economic, or professional repercussions.

The Court finds that the City did not infringe upon the voluntariness of Plaintiffs' waiver by

---

[11] *See, e.g.*, DE 51, Ex. 1, pp. 84-85 ("[E]ither I signed it or I wouldn't be able to go into the DROP plan, so I had to sign it; or if I waited I . . . wouldn't have gotten on the DROP plan at all, so I had to sign it."); Ex. 14, p. 39 ("Was there a gun held to my head? It depends. I mean, a gun is more than something that just shoots a bullet. Were there financial considerations I had to make? Yes. So was there a gun to my head? So to speak.").

extending to them an economic benefit they considered too good to pass up. Indeed, "[a] person contemplating an offer of early retirement may find the choice hard because *both* options – continued employment and early retirement – are desirable. The high value of each option hardly calls the voluntariness of the choice into question, however." *Henn v. Nat'l Geographic Soc.*, 819 F.2d 824, 829 (7th Cir.1987). The fact that Plaintiffs felt "forced" to sign the Waiver and enter DROP simply speaks to the quality of the benefit extended by the City. If the officers did not feel compelled to enter DROP, the City would not have done a good job on the "incentive" portion of its early retirement incentive program. *See Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66, 74 (2d Cir.2004) ("[A] n early retirement plan must, at a minimum, provide some incentive to retire. In other words, the plan must make retirement a relatively more attractive option than continuing to work.")

In making this finding, the Court is not weighing the facts regarding Plaintiffs' voluntariness, and finding for the City. Rather, the Court finds that while Plaintiffs spoke of non-voluntariness, when questioned at their depositions they admitted that they freely entered DROP, and freely signed the attendant Waiver. *See, e.g.*, DE 51, Ex. 1, pp. 84-85; Ex. 11, pp. 33-37. While Plaintiffs employed language indicating involuntariness to describe the difficult choice between retiring under normal retirement, or availing themselves of the new benefits afforded by

DROP, a choice is not rendered non-voluntary by the fact that it is difficult. *Henn,* 819 F.2d at 829. Further, a choice is not rendered non-voluntary simply because it was, as in this case, too good to refuse. Accordingly, the Court finds that Plaintiffs' statements to the effect that they felt forced to sign the Waiver do not create a genuine issue of material fact as to the voluntariness of those Waivers.

In sum, the Court finds that each of the Plaintiffs, with the exception of James Gaughen, executed a Waiver of the claims they now attempt to assert against the City. The Court further finds that the Waiver satisfies the standard for knowing and voluntary as set forth in OWBPA. Finally, the Court finds that Plaintiffs' additional arguments are without merit in that they do not raise a genuine issue of material fact as to the legitimacy of the Waiver, or as to whether the aforementioned Plaintiffs knowingly and voluntarily executed the same. Accordingly, the Court finds that the City is entitled to judgment as a matter of law regarding the claims alleged by each of the Plaintiffs with the exception of Gaughen. Because Gaughen's claims remain, and in the event that any reviewing court finds that Plaintiffs have not waived their claims against the City, the Court will now consider the lawfulness of DROP.

C. Lawfulness of DROP

The ADEA makes it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (2006). The FCRA, in turn, states that it is unlawful to "discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . age." Fla. Stat. § 760.10 (2008). The analysis the Court employs regarding a claim of age discrimination is the same under the ADEA and the FCRA. *Zaben v. Air Products & Chemicals, Inc.*, 129 F.3d 1453, 1455 (11th Cir.1997); *Morrow v. Duval County Sch. Bd.*, 514 So.2d 1086 (Fla.1987).

While this prohibition is set forth in a straight forward manner, "[t]he question of the proper treatment of early-retirement programs is the most difficult question under the Age Discrimination in Employment Act." *Karlen v. City of Colleges*, 837 F.2d 314, 317 (7th Cir.1988). This is so because the discussions leading up to the implementation of such a program necessarily involve questions of age and the benefits to be gained by an employer if certain employees retire, but the resultant "discrimination seems to be in favor of rather than against older employees, by giving them an additional option and one prized by many older employees." *Id.* Difficulty in applying this area of the law has been increased over the years by an exchange between Congress and the Supreme Court that saw numerous modifications in

the analysis used to test the lawfulness of retirement incentive plans. *See Auerbach v. Bd. of Educ. of the Harborfields Cent. Sch. Dist. of Greenlawn,* 136 F.3d 104, 110-12 (2d Cir.1998) (discussing the back and forth between Congress and the Supreme Court). This exchange culminated with the enactment of OWBPA, which amended various provisions of the ADEA.

To establish a prima facie case, a "'plaintiff must produce sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion.'" *Alphin v. Sears, Roebuck & Co.,* 940 F.2d 1497, 1500 (11th Cir.1991) (quoting *Halsell v. Kimberly-Clark Corp.,* 683 F.2d 285, 290 (8th Cir.1983)). This is achieved "through one of three generally accepted methods: by direct evidence of discriminatory intent; by meeting the four-pronged test set out for Title VII cases in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); or through statistical proof." *Carter v. City of Miami,* 870 F.2d 578, 581 (11th Cir.1989). The Court will address these three avenues in turn.

First, Plaintiffs have failed to produce direct evidence of discriminatory intent. Plaintiffs have offered evidence in the form of statements suggesting DROP was established to encourage older, higher paid officers to retire. *See, e.g.,* DE 60, Ex. B, pp. 9-10. Plaintiffs also emphasize the deposition testimony of James Gaughen in which he said that Jack Lokeinsky, FLPD Detective, said "the City wants to

get rid of you old farts." DE 51, Ex. 4, p. 59. However, Mr. Gaughen was neither able to testify whether that comment indeed was made by an authorized agent of the City, nor who made the comment. The Court will disregard this comment because it constitutes double hearsay, and the initiating source of the comment is unknown. Second, Plaintiffs claims do not necessitate *McDonnell Douglas* review because Plaintiffs do not allege any indirect evidence of discrimination.

Third, Plaintiffs have failed to establish a prima facie case based on disparate impact because they have not offered statistical evidence in support. To establish a prima facie case of disparate impact, a plaintiff must show,

> 1) there is a significant statistical disparity among members of different [age] groups; 2) there is a specific, facially-neutral employment policy or practice; and 3) there is a causal nexus between the specific policy or practice and the statistical disparity.

See Cooper v. S. Co., 390 F.3d 695, 724 (11th Cir.2004), *overruled on other grounds, Ash v. Tyson Foods, Inc.,* 546 U.S. 454, 457, 126 S.Ct. 1195, 163 L.Ed.2d 1053 (2006). The only evidence offered by Plaintiffs is the following example:

> if a police officer turns 40 at his 20 year anniversary with the department, by the time he is eligible for the DROP plan, at age 45, he will have accrued a maximum pension retirement percentage of 81% (3.38% x 24 years) of their salary and he will also be able

> to reap the benefit of a full 60 month DROP plan. However, in the case of an officer who is 45 or older at his 20 year anniversary, he would be faced with the dilemma of entering the DROP plan with a pension retirement percentage of 67.5% of his salary and retiring in 5 years, or he could bypass the DROP altogether and continue to work for 4 more years where he could then max out his retirement at 81% at age 49, but only have 12 months of DROP and retirement in one year.

DE 180, p. 13. This example oversimplifies the facts of this case. Seven of the fourteen Plaintiffs in this case receive a pension greater than 81% in addition to their DROP benefits: David Ecklund (90.4%), Timothy Falk (83.3%), James Gaughen (91.26%), Stephen Medley (84.3%), David Nickerson (85.1%), Sam Wernick (91.26%), and Jim Wigand (90.4%).

Thus, the example does not cover the group of persons joined in this action. In fact, if Plaintiffs had performed a detailed statistical analysis of the retirement benefits older workers received in comparison to younger workers, it may yield the result that older workers received even more lucrative retirement packages than younger workers could hope to attain. However, no such statistical analysis has been provided to the Court. Thus, Plaintiffs have failed to establish a prima facie case of disparate impact.

However, for the benefit of the Parties and any reviewing court, the Court will assume a prima facie case has been established and address the City's affirmative defense. The City argues that its DROP program fits within the safe harbor provision of the ADEA. When considering an early retirement incentive program like DROP, the Court notes that OWBPA provides the following:

> It shall not be unlawful for an employer, employment agency, or labor organization –
> . . .
>
> (2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section – . . .
>
> (B) to observe the terms of a bona fide employee benefit plan –
>
> (i) where for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, . . . ; or
>
> (ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

29 U.S.C. § 623(f)(2)(B)(i)-(ii) (2006).

Plaintiffs are challenging the age component of DROP, an early retirement incentive program, thus the safe harbor found in § 623(f)(2)(B)(ii) (hereinafter

the "safe harbor") guides the Court's analysis. The safe harbor "does not require that an employer provide identical early retirement incentives for employees of different ages or incur the same costs for all employees. Rather, the early retirement incentive plan need only be voluntary and consistent with the ADEA's relevant purpose(s)." *Auerbach,* 136 F.3d at 112.

The Court finds the City's DROP program is both voluntary and consistent with the ADEA's purpose. First, the program is completely voluntary. Although Plaintiffs argue their decision was not voluntary, the Court finds otherwise. No one improperly threatened, coerced, or pressured Plaintiffs to register for the DROP program. Instead, Plaintiffs' own statements make clear that they enrolled in the program because it was too good to refuse. Thus, all Plaintiffs, with the exception of Mr. Gaughen, voluntarily signed up for DROP.

Second, the City's DROP program fits within the purpose of the ADEA. Of crucial importance is the fact that the DROP program is a carrot, not a stick. This case is not one in which older workers are being fired or otherwise forced out without a say in the matter. Instead, this is one in which a municipality created an incentive for officers to voluntarily enter a program that offered increased retirement benefits for those who chose to retire early. Plaintiffs argue that the 2000 Agreement resulted in older workers receiving less benefits under DROP than younger workers. However, the undisputed facts demonstrate

otherwise. While the 2000 Agreement provided for a maximum accrual rate of 81%, several of Plaintiffs were allowed to exceed the maximum accrual rate. *Supra,* pp. 4, 29 (David Ecklund (90.4%), Timothy Falk (83.3%), James Gaughen (91.26%), Stephen Medley (84.3%), David Nickerson (85.1%), Sam Wernick (91.26%), and Jim Wigand (90.4%)). Thus, older workers, in some cases, were treated more favorably than younger workers.

The Court does acknowledge that some Plaintiffs received less lucrative retirement benefits than others. The basis for this discrepancy, however, is not the age of Plaintiffs; rather, it results from their pension status, a complex framework created as a result of the ongoing negotiations between the City and the FOP that determines the benefits an officer receives. Although age is one factor that weighs in to an officer's pension status, it is not an impermissible component. *Hazen Paper Co. v. Biggins,* 507 U.S. 604, 613, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). The Supreme Court has recently reaffirmed its prior holding that discrimination on the basis of pension status is not unlawful under the ADEA, so long as it is not a "proxy for age." *Ky. Ret. Sys. v. EEOC,* ___ U.S. ___, 128 S.Ct. 2361, 2366-67, 171 L.Ed.2d 322 (2008) (noting that a complex set of rules determined benefits, rather than individual employment decisions) (quoting *Hazen Paper Co.,* 507 U.S. at 613). In other words, age can be considered in the framework of an employees' benefits, but it should not be the basis of individual employment decisions that

negatively affect certain employees. Further, the rules embedded in pension systems are treated "more flexibly and leniently in respect to age" by the ADEA. *Id.* at 2367

The discrepancy in pension accrual rates between Plaintiffs and others is based on their respective pension status, not their age alone. The benefits each individual Plaintiff receives is a result of a complex set of factors negotiated between the City and FOP, in which age is one factor. DE 51, Ex. 16, ¶ 11. The benefits are not determined by individual employment decisions based on age. For instance, Mr. Lerman did not enter DROP when he initially became eligible, and thus, he lost the ability to accrue the full spectrum of DROP benefits that would have been afforded to him. He and others, for various reasons, chose not to enroll in DROP upon initial eligibility and lost some of the benefits of earlier enrolment [sic]. Thus, the reduction in benefits resulting from Plaintiffs' decision not to enrol [sic] in DROP at their earliest point of eligibility is attributable solely to their own decision, and it is part of the complex framework that determines the benefits they are entitled to. Therefore, the Court finds the City's DROP program falls within the safe harbor provision of the ADEA because it is voluntary and in accord with the purposes of the ADEA. Further, any disparity between Plaintiffs and others is attributable to their pension status, not their age. *Hazen Paper Co.*, 507 U.S. at 613; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

IV. *Conclusion*

The Court finds that thirteen of the fourteen Plaintiffs to the above-styled cause released the City from liability it may otherwise have had for these claims. Alternatively, the Court finds that DROP is non-discriminatory as to all Plaintiffs. Thus, the Court does not reach Defendant's other arguments in support of the instant Motion.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. That Defendant City of Fort Lauderdale's Motion For Summary Judgment (DE 173) be and the same is hereby **GRANTED;** and

2. Plaintiffs' Renewed Cross Motion For Partial Summary Judgment As To Liability (DE 181) be and the same is hereby **DENIED;** and

3. Pursuant to Rules 56 and 58, Final Judgment shall be entered by separate Order.

DONE AND ORDERED.

123 Stat 5

UNITED STATES PUBLIC LAWS
111th Congress – First Session
Convening January 04, 2009

Copr. © 2009 Thomson Reuters.
No Claim to Orig. U.S. Govt. Works

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL 111-2 (S 181)
January 29, 2009
LILLY LEDBETTER FAIR PAY ACT OF 2009

An Act To amend title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967, and to modify the operation of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other practice that is unlawful under such Acts occurs each time compensation is paid pursuant to the discriminatory compensation decision or other practice, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lilly Ledbetter Fair Pay Act of 2009".

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Supreme Court in Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The Ledbetter decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

(3) With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment

practice that has occurred outside the time for filing a charge of discrimination.

(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.

SEC. 3. DISCRIMINATION IN COMPENSATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended by adding at the end the following:

"(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

"(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years

preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.".

SEC. 4. DISCRIMINATION IN COMPENSATION BECAUSE OF AGE.

Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended –

(1) in the first sentence –

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively; and

(B) by striking "(d)" and inserting "(d)(1)";

(2) in the third sentence, by striking "Upon" and inserting the following:

"(2) Upon"; and

(3) by adding at the end the following:

"(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in

compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.".

SEC. 5. APPLICATION TO OTHER LAWS.

(a) AMERICANS WITH DISABILITIES ACT OF 1990. – The amendments made by section 3 shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to section 107(a) of such Act (42 U.S.C. 12117(a)), which adopts the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5).

(b) REHABILITATION ACT OF 1973. – The amendments made by section 3 shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to –

(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 for determining whether a violation has occurred in a complaint alleging employment discrimination; and

(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c)).

(c) CONFORMING AMENDMENTS. –

(1) REHABILITATION ACT OF 1973. – Section 505(a) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)) is amended –

(A) in paragraph (1), by inserting after "(42 U.S.C. 2000e-5(f) through (k))" the following: "(and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation)"; and

(B) in paragraph (2), by inserting after "1964" the following: "(42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation)".

(2) CIVIL RIGHTS ACT OF 1964. – Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended by adding at the end the following:

"(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section.".

(3) AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967. – Section 15(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(f)) is amended by striking "of section" and inserting "of sections 7(d)(3) and".

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date.

Approved January 29, 2009.

PL 111-2, 2009 S 181

No. 09-773

IN THE

Supreme Court of the United States

STEVEN LERMAN, *et al.*,

Petitioners,

v.

CITY OF FORT LAUDERDALE, FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF FORT LAUDERDALE, FLORIDA

FREDERICK T. SMITH
SEYFARTH SHAW LLP
1545 Peachtree St., N.E.
Suite 700
Atlanta, Georgia 30309
(404) 885-1500

GERALD L. MAATMAN, JR.
Counsel of Record
SEYFARTH SHAW LLP
131 South Dearborn St.
Suite 2400
Chicago, Illinois 60603
(312) 460-5000

Attorneys for Respondent
City of Fort Lauderdale, Florida

January 29, 2010

QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's summary judgment order does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not argue that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court insofar as the Eleventh Circuit applied well-settled law regarding age discrimination waivers.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the District Court's summary judgment order does not conflict with a decision of this Court or a Court of Appeals, and where Petitioners do not claim that the Eleventh Circuit's ruling implicates an important federal question that has not been settled by this Court insofar as the Eleventh Circuit applied well-settled law on burdens of proof in age discrimination cases.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

RESPONDENT'S STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 3

I. Petitioners Have Presented No Compelling Reasons To Grant The Petition, Where The Eleventh Circuit's Opinion Affirming The District Court's Summary Judgment Order Applied Settled Law Applicable To Age Discrimination Waivers 3

A. The Eleventh Circuit Properly Found That The Waivers Executed By Petitioners Were Lawful, Consistent With The OWBPA, And Eliminated Any Basis For Their Lawsuit 4

B. The Eleventh Circuit Appropriately Found That The LLFPA Does Not Create A New Cause of Action For Each DROP Payment Petitioners Received After Executing Valid Releases 4

C. Petitioners Also Fail To Demonstrate That There Are Any Circuit Conflicts On Any Issues Decided Below By The Eleventh Circuit On Post-LLFPA Cases That Demonstrate Any Compelling Reasons To Grant The Petition 9

D. Post-LLFPA Cases Cited By Petitioners Do Not Support Their Argument That The Statute Creates A New Cause Of Action For Each Post-Waiver DROP Payment They Received 10

E. While The Eleventh Circuit Never Reached The Issues, If The LLFPA Applies To This Case As Petitioners Contend, Its Retroactive Application Would Be Unconstitutional Under Both The Due Process And Ex Post Facto Clauses..... 11

II. Petitioners Have Presented No Compelling Reasons To Grant The Petition, Where The Eleventh Circuit's Opinion Affirming The District Court's Summary Judgment Order Applied Settled Law In Finding That There Was No Genuine Issue Of Material Fact That Pension Status Under The DROP Was

Not A Proxy For Alleged Age Discrimination. 19

A. The Eleventh Circuit Applied This Court's Well-Settled Law In Affirming The District Court's Determination That Their Differential Treatment Was Not "Actually Motivated" By Age 20

B. Petitioners Have Not Shown That Age Was The "But-For" Cause Of The City's Decision To Implement DROP, As Required By This Court In Gross v. FBL Financial Services, Inc. 22

III. Conclusion 23

TABLE OF AUTHORITIES

Page(s)

CASES

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 13

Calder v. Bull,
3 U.S. (3 Dall.) 386 (1798) 16, 17

Carmell v. Texas,
529 U.S. 513 (2000) 18

Eastern Enter. v. Apfel,
524 U.S. 498 (1998) 13, 14, 16, 17

Flemming v. Nestor,
363 U.S. 603 (1960) 18

Florida v. Long,
487 U.S. 223 (1988) 7, 8

Gentry v. Jackson State Univ.,
610 F. Supp. 2d 564 (S.D. Miss. 2009) 11

Gross v. FBL Financial Services, Inc.,
129 S. Ct. 2343 (2009) 3, 20, 22

Harisiades v. Shaughnessy,
342 U.S. 580 18

Hester v. N. Alabama Ctr. for Educ. Excellence,
No. 08-17037, 2009 U.S. App. LEXIS 25225
(11th Cir. Nov. 17, 2009) (1952) 9

In Re Workers' Comp. Refund,
46 F. 3d 818 (8th Cir. 1995) 16

Johnson v. S.E.C.,
87 F.3d 484 (D.C. Cir. 1996) 18

Kaiser Aluminum & Chem. Corp. v. Bonjorno,
494 U.S. 827 (1990) 13

Kentucky Retirement Systems v. EEOC,
128 S. Ct. 2361 (2008) 2, 3, 19, 20, 21, 22

Landgraf v. USI Film Prods.,
511 U.S. 244 (1994) 13

Ledbetter v. Goodyear Tire & Rubber Co.,
550 U.S. 618 (2007) 5, 7

Lipscomb v. Winter,
No. 08-5452, 2009 U.S. App. LEXIS 7036
(D.C. Cir. Apr. 3, 2009) 10

Lloyd v. Brunswick Corp.,
180 F.3d 893 (7th Cir. 1999) 15

Lockheed Corp.,
517 U.S. 882, 894 n. 6 (1996) 15

Mikula v. Allegheny County of Penn.,
583 F.3d 181 (3d Cir. 2009) 9

Miller v. Kempthorne,
No. 08-2466, 2009 U.S. App. LEXIS 27952
(2d Cir. Dec. 21, 2009) 9

Myrie v. Comm'r, N.J. Dep't of Corr.,
267 F.3d 251 (3d Cir. 2001) 18

NRG Co.,
24 Cl. Ct. 51 (Cl. Ct. 1991) 16

Oubre v. Entergy Operations, Inc.,
522 U.S. 422 (1998) 3, 4

Pension Benefit Guar. Corp. v. R.A. Gray & Co.,
467 U.S. 717 (1984) 12

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 13, 14, 16

Rehman v. State Univ. of New York at Stony Brook,
596 F. Supp. 2d 643 (E.D.N.Y. 2009) 11

Rzepiennik v. Archstone-Smith, Inc.,
331 Fed. Appx. 584 (10th Cir. 2009) 9

Shea v. Clinton,
No. 08-5491, 2009 U.S. App. LEXIS 7142
(D.C. Cir. Apr. 2, 2009) 10

Shockley v. Minner,
No. 06-478 JJF, 2009 U.S. Dist. LEXIS 31289
(D. Del. Mar. 31, 2009) 11

Tomlinson v. El Paso Corporation,
No. 04-CV-02686-WDM-MEH, 2009 WL
2766718 (D. Col. Aug. 28, 2009) 8, 9, 11

United States v. Halper,
490 U.S. 435 (1989) 18

Vuong v. New York Life Ins. Co.,
No. 03-01075, 2009 WL 306391 (S.D.N.Y. Feb. 6, 2009) 11

Weaver v. Graham,
450 U.S. 24 (1980) 18

STATUTES

29 U.S.C. § 621 2

29 U.S.C. § 623(f)(2)(B)(ii) 2

29 U.S.C. § 626(d) 6

29 U.S.C. § 626(f)(1) 4

Age Discrimination in Employment Act of 1967 ..... 2, 3, 4, 5, 6, 7, 8, 15, 19, 20, 21, 22

Lilly Ledbetter Fair Pay Act of 2009 .. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19

Section 27A(b) of the Securities Exchange Act of 1934 14

OTHER AUTHORITIES

Ex Post Facto Clause of the United States Constitution 12, 16, 17

Laura Ricciardi and Michael Sinclair, *Retroactive Civil Legislation*, 27 U. Tol. L. Rev. 301, 316-18 (1996) 17

Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 212 (1980) 17

Sup. Ct. R. 10 3

The Fifth Amendment Of The United States Constitution 12, 14, 15, 16

U.S. Const. amend. V 12

U.S. Const. art. I, § 9 16

JURISDICTION

Respondent does not contest Petitioners' Statement of Jurisdiction.

STATUTORY PROVISIONS INVOLVED

Respondent does not contest Petitioners' statement of the statutory provisions involved. However, it is Respondent's position that the Lilly Ledbetter Fair Pay Act of 2009 is not applicable to this case.

RESPONDENT'S STATEMENT OF THE CASE

Petitioners, a group of current and retired City police officers, allege that the City intentionally discriminated against them because of their age through its Deferred Retirement Option Program ("DROP") in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* ("ADEA").

On September 28, 2009, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's grant of summary judgment to the City on several grounds. First, because Petitioners signed releases as a prerequisite to entering DROP, the District Court properly held that Petitioners had waived their right to seek legal recourse against the City. Second, the Eleventh Circuit held that the District Court properly found that the City's DROP does not violate the ADEA because Petitioners did not show that age "actually motivated" the City's decision as required by *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008). Third, the Eleventh Circuit upheld the District Court's determination that even if DROP were discriminatory, it would be permitted under the safe harbor provision of the ADEA, 29 U.S.C. § 623(f)(2)(B)(ii). Finally, the Eleventh Circuit concluded that the LLFPA did not apply in this case.

Petitioners have failed to meet their burden of establishing compelling reasons for granting their Petition for Writ of Certiorari. The Eleventh Circuit's decision does not conflict with decisions of any other federal circuit courts. Nor does the Eleventh Circuit's Opinion involve a departure from the usual course of

judicial proceedings, or implicate an area of federal law left unresolved by this Court in *Kentucky Retirement Systems* and *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court or any federal circuit court nor does it implicate a federal question that has not been decided by this Court. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

These and other reasons for denial of the Petition are set forth more fully below.

I. Petitioners Have Presented No Compelling Reasons To Grant The Petition, Where The Eleventh Circuit's Opinion Affirming The District Court's Summary Judgment Order Applied Settled Law Applicable To Age Discrimination Waivers

Petitioners have not shown compelling reasons for this Court to grant certiorari because the Eleventh Circuit and the District Court correctly applied well-settled law regarding waivers of rights under the ADEA. An employee's waiver of his or her rights under the ADEA must satisfy the requirements of the Older Workers Benefit Protection Act ("OWBPA"). *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 426-27 (1998). It is well-established that the requirements of the OWBPA are met if an employee's waiver of his or her ADEA rights is both knowing and voluntary. *Id.* (citing

29 U.S.C. § 626(f)(1)). As set forth more fully below, the Eleventh Circuit's decision is wholly consonant with *Oubre*, and Petitioners have not demonstrated that this Court's review of the decision is warranted.

A. The Eleventh Circuit Properly Found That The Waivers Executed By Petitioners Were Lawful, Consistent With The OWBPA, And Eliminated Any Basis For Their Lawsuit

In affirming the District Court's grant of summary judgment to the City, the Eleventh Circuit properly found that Petitioners knowingly and voluntarily waived their ADEA rights in accordance with the OWBPA and *Oubre*. Pet. App. at 4. Petitioners failed to challenge whether their waivers were knowing and voluntary before the District Court or on appeal to the Eleventh Circuit. Pet. App. at 4, 20. Petitioners have not shown that the Eleventh Circuit's decision conflicts with *Oubre* or any decisions of other federal circuit courts. Because Petitioners' waivers comply with the statutory requirements of the OWBPA and the principles set forth in *Oubre*, the Eleventh Circuit properly upheld the District Court's determination that Petitioners waived their ADEA claims relating to the City's DROP.

B. The Eleventh Circuit Appropriately Found That The LLFPA Does Not Create A New Cause of Action For Each DROP Payment Petitioners Received After Executing Valid Releases

Petitioners contend that under the Lilly Ledbetter Fair Pay Act of 2009 ("LLFPA"), they can pursue

ADEA claims against the City for DROP payments they received after executing valid OWBPA waivers. Specifically, Petitioners contend that a new cause of action accrued each time they received post-waiver DROP payments regardless of when the City decided to include age as a component to the DROP. Pet. at 16. In flatly rejecting this argument, the Eleventh Circuit appropriately found that the LLFPA did not apply in this case for two reasons. First, the LLFPA was inapplicable because it involves the statute of limitations in pay discrimination cases. Pet. App. at 4. Second, the LLFPA did not implicate Petitioners' valid waivers of their ADEA rights. *Id.*

1. The LLFPA Is Not Relevant To Petitioners' Claims, As It Is Limited To The Applicable Statute Of Limitations For Pay Discrimination Claims

As an initial matter, the LLFPA amended the ADEA to make it clear when an unlawful employment practice occurs for purposes of the statute of limitations. Thus, the LLFPA is wholly irrelevant to Petitioners' claims, as it does not nullify or impact a claim that has been waived as part of a release agreement even if the economic consequences of that decision are felt after the signing of the release.

In reversing this Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), Congress concluded that *Ledbetter* "significantly impairs statutory protections against discrimination in compensation" by imposing a restriction "on the filing of

discriminatory compensation claims [that] ignores the reality of wage discrimination." LLFPA, § 2(1) & (2). Congress removed that restriction by amending the limitations period for pay discrimination claims brought under the ADEA and other federal employment statutes. *See id.*, §§ 3-5 (29 U.S.C. § 626(d) as applied to age claims). Specifically, the LLFPA provides that the limitations period under each of these statutes restarts for aggrieved employees upon receipt of each paycheck that allegedly reflects a past discriminatory compensation decision:

> For purposes of this section [*i.e.*, filing a charge of discrimination with the EEOC within the applicable statute of limitations], an unlawful practice occurs, with respect to discrimination in compensation in violation of this chapter, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

29 U.S.C. § 626(d).

The LLFPA has no bearing on the disposition of this case because – as noted by the District Court and

adopted by the Eleventh Circuit in its Opinion – the point where a claim might accrue for purposes of the statute of limitations is not the same as when a claim arises for purposes of a release. Pet. App. 22-23. The purpose of the LLFPA was to amend the statute of limitations in light of the *Ledbetter* decision. There is no indication from either the legislative history or the statutory language of the LLFPA that Congress intended to allow employees to resurrect ADEA claims that they had already waived as part of valid releases.

2. The Eleventh Circuit Properly Held That The LLFPA Did Not Implicate Petitioners' Valid Releases

Petitioners attempt to avoid the LLFPA's plain language and legislative history by arguing that each of their post-waiver DROP payments gave rise to a new cause of action because DROP payments – unlike typical pension payments – involve the calculation of retirement benefits rather than the payment of such benefits. In particular, Petitioners attempt to distinguish the instant case from this Court's decision in *Florida v. Long*, 487 U.S. 223, 239 (1988). In *Long*, this Court held that "[i]t is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation." *Id.* at 239. Here, Petitioners submit that the Eleventh Circuit, in adopting the District Court's decision, improperly found that the discovery rule applied to Petitioners' claims because they knew or should have known of their alleged injury before executing the waivers. Pet. at 16. Petitioners urge this Court to hold that the discovery rule is inconsistent with

the plain language of the LLFPA especially where employees continue working for their employers as Petitioners did when they participated in the City's DROP. Pet. at 16.

Notwithstanding Petitioners' contentions, the Eleventh Circuit correctly construed the LLFPA in holding that it does not implicate Petitioners' valid releases. Petitioners have not pointed to any decisions of this Court or any federal circuit court in support of their argument that each post-waiver DROP payment gave rise to a new cause of action in light of the LLFPA. Rather, Petitioners rely on the unreported decision of a District Court in Colorado - *Tomlinson v. El Paso Corporation*, No. 04-CV-02686-WDM-MEH, 2009 WL 2766718 (D. Col. Aug. 28, 2009) - which is inapposite. In *Tomlinson*, the plaintiffs challenged the conversion of the employer's defined benefit plan on the grounds that the "wear away" period – the time that benefits did not accrue until cash balance benefits caught up to and exceeded benefits under the previous formula – violated the ADEA. *Id.* at *1. Although the District Court found that the case involved the rate of accrual of retirement benefits rather than retirement payments such that *Long* was not controlling, the issue in *Tomlinson* was whether the LLFPA applied so that plaintiffs' charges of discrimination were timely filed within 300 days of the alleged discriminatory act (*i.e.*, the date on which benefits accrued). *Id.* at *3-4. In finding that the LLFPA did apply, the District Court reversed its grant of summary judgment to the defendant on Plaintiff's ADEA claims. *Id.* at *4. The District Court was not presented with facts where, as here, employees had executed valid waivers of their ADEA claims. Accordingly, the

unreported decision in *Tomlinson* hardly justifies this Court's review of the Eleventh Circuit's decision.

C. Petitioners Also Fail To Demonstrate That There Are Any Circuit Conflicts On Any Issues Decided Below By The Eleventh Circuit On Post-LLFPA Cases That Demonstrate Any Compelling Reasons To Grant The Petition

Petitioners have not argued, nor can they, that a conflict among the federal circuit courts exists on any of the issues decided by the Eleventh Circuit so that review by this Court would be warranted. Indeed, only a handful of federal circuit courts have had the occasion to even address the LLFPA, and none were presented with the facts and legal issues involved in the instant case. *See Miller v. Kempthorne*, No. 08-2466, 2009 U.S. App. LEXIS 27952, at *2-3 (2d Cir. Dec. 21, 2009) (reversing grant of summary judgment on claim dismissed as untimely as the LLFPA made timely plaintiff's claim that he was classified under the wrong wage grade); *Hester v. N. Alabama Ctr. for Educ. Excellence*, No. 08-17037, 2009 U.S. App. LEXIS 25225, at *3 (11th Cir. Nov. 17, 2009) (vacating district court's order on summary judgment dismissing Title VII wage discrimination claim as untimely in light of the LLFPA); *Mikula v. Allegheny County of Penn.*, 583 F.3d 181, 186 (3d Cir. 2009) (reversing grant of summary judgment to employer as plaintiff's Title VII pay discrimination claims were timely under the LLFPA as to paychecks reflecting a "'periodic implementation' of a previously made intentionally discriminatory employment decision or 'other practice'"); *Rzepiennik v. Archstone-Smith,*

Inc., 331 Fed. Appx. 584, 589 (10th Cir. 2009) (noting that Congress did not intend for the LLFPA to alter the limitations period for retaliation claims brought under the Sarbanes-Oxley Act); *Lipscomb v. Winter*, No. 08-5452, 2009 U.S. App. LEXIS 7036, at *2 (D.C. Cir. Apr. 3, 2009) (remanding failure to promote claims for consideration in light of the LLFPA); *Shea v. Clinton*, No. 08-5491, 2009 U.S. App. LEXIS 7142, at *1 (D.C. Cir. Apr. 2, 2009) (remanding case for consideration in light of the LLFPA).

As indicated by the federal circuit court decisions above, a split of authority on the LLFPA among these courts simply does not exist. Given the recent passage of the LLFPA, conflicting decisions among the federal circuit courts are lacking and thus review by this Court is not justified.

D. Post-LLFPA Cases Cited By Petitioners Do Not Support Their Argument That The Statute Creates A New Cause Of Action For Each Post-Waiver DROP Payment They Received

Petitioners rely on post-LLFPA decisions of federal district courts in support of their contention that lower courts require this Court's guidance with respect to the proper application of the LLFPA. However, none of the cases upon which Petitioners rely supports their position that the LLFPA creates a new cause of action for each post-waiver DROP payment they received. In fact, each of the cases directly involves the applicable statute of limitations for pay discrimination claims, which is precisely what the LLFPA was enacted to

address, but is not at issue here. *See Gentry v. Jackson State Univ.*, 610 F. Supp. 2d 564, 567 (S.D. Miss. 2009) (denying summary judgment to employer where charge of discrimination relating to denial of tenure/denial of salary increase claim was not untimely under the LLFPA); *Vuong v. New York Life Ins. Co.*, No. 03-01075, 2009 WL 306391, at *4 (S.D.N.Y. Feb. 6, 2009) (holding that claim relating to decision to allocate plaintiff a lesser percentage of performance-related compensation than his co-managing partner was timely under the LLFPA); *Rehman v. State Univ. of New York at Stony Brook*, 596 F. Supp. 2d 643, 651 (E.D.N.Y. 2009) (holding as timely plaintiff's wage discrimination claims based on actions that occurred two years before he filed his charge of discrimination); *Shockley v. Minner*, No. 06-478 JJF, 2009 U.S. Dist. LEXIS 31289, at *3 (D. Del. Mar. 31, 2009) (finding that the LLFPA eliminated the discovery rule in Section 1983 cases); *Tomlinson*, 2009 WL 2766718, at *3-4 (LLFPA applied so that plaintiffs' charges of discrimination were timely filed within 300 days of the alleged discriminatory act (i.e., the date on which benefits accrued)).

E. While The Eleventh Circuit Never Reached The Issues, If The LLFPA Applies To This Case As Petitioners Contend, Its Retroactive Application Would Be Unconstitutional Under Both The Due Process And Ex Post Facto Clauses.

Even if Petitioners could establish that Congress intended the LLFPA to apply to their case, the retroactive application of the LLFPA would be

unconstitutional under the Fifth Amendment's Due Process Clause and the Ex Post Facto Clause of the United States Constitution as more fully set forth below. The Eleventh Circuit never addressed these issues, which Respondent raised below as additional reasons for affirmance of the District Court's summary judgment order.[1]

1. Retroactive Application Of The LLFPA Violates The Due Process Clause Of The Fifth Amendment Of The United States Constitution.

The Due Process Clause of the Fifth Amendment protects against the arbitrary deprivation of life, liberty, or property by governmental action. U.S. Const. amend. V. Retroactive legislation that violates the Due Process Clause is unconstitutional. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) ("The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."). Indeed, "[t]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and

---

[1] Even if Petitioners had established sufficient grounds for granting their Petition for Certiorari (which Petitioners have not established), a remand to the Eleventh Circuit would be more appropriate to consider and rule on this issue.

universal human appeal ... [and] has long been a solid foundation of American law." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

When Congress has provided for retroactive application of a law (as with the LLFPA), such provisions are subject to scrutiny. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Eastern Enter. v. Apfel*, 524 U.S. 498 (1998). To weigh the constitutionality of such provisions, this Court has distinguished retroactive provisions that are primary in nature from those which are secondary in nature. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (distinguishing between primary and secondary retroactivity and stating that "retroactivity is not favored in the law"). Primary retroactivity refers to legislation that converts an action that was lawful at the time it was taken into an unlawful act. *See Plaut*, 514 U.S. at 214. Secondary retroactivity refers to legislation that expands the remedies available for what is already an unlawful act (*e.g.*, allowing for the possibility of compensatory damages where such damages were previously unavailable). *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 (1994) (holding, in effect, that where legislation is only secondarily retroactive, its retroactive nature would not, by itself, invalidate the law).

Where, as here, a retroactive provision is primary, it is invalid regardless of Congress' intentions with regard to retroactivity. *See Plaut*, 514 U.S. at 214. In *Plaut*, this Court addressed the question of whether a federal statute that purported to apply retroactively required a federal court to reopen a judgment in a private

civil action. *Id.* The retroactive legislation, Section 27A(b) of the Securities Exchange Act of 1934, sought to undo the effect of a Supreme Court decision by requiring courts to reopen securities fraud cases that had been dismissed based on the Supreme Court's earlier decision. *See id.* at 218. Although the Supreme Court invalidated the statute on the grounds that it violated separation of powers principles, the Supreme Court also noted that the statute's retroactive provision was primary in nature because it altered the legal consequences of past actions by making previously lawful conduct unlawful. *See id.* at 225; *see also Eastern Enters.*, 524 U.S. at 529-37 (holding that retroactive imposition of lifetime employee health benefits liabilities under the Coal Act raised issues under both the Takings Clause and the Due Process Clause of the Fifth Amendment.[2] Justice Kennedy reasoned that "chang[ing] the legal consequences of transactions long closed ... can destroy the reasonable certainty and security which are the very objects of property ownership." *Id.* at 548. As a result,

---

[2] The plurality opinion grounded its decision on the Takings Clause of the Constitution, without deciding whether the Due Process Clause would also invalidate the Coal Act. Justice Kennedy, in his concurring opinion, however, clearly felt that the Due Process Clause was a better vehicle for reaching that result. Specifically, Justice Kennedy explained that Congress' attempt to make business owners retroactively liable for funding health benefits for retired miners was unconstitutional. *Id.* at 547.

Justice Kennedy identified the retroactivity of the Coal Act as a violation of the Due Process Clause. *Id.* at 550.

In this instance, the LLFPA is primarily retroactive because it makes conduct unlawful that, prior to its passage, was lawful. Before the LLFPA became law, it was permissible – even common – for employers to obtain releases from employees in exchange for receiving early retirement benefits. *See, e.g., Lockheed Corp.*, 517 U.S. 882, 894 n. 6 (1996) (noting that an employer can protect itself from future liability by asking employee to sign release in exchange for severance); *Lloyd v. Brunswick Corp.*, 180 F.3d 893, 895 (7th Cir. 1999) (noting that employers often offer early retirement benefits to individuals protected by the ADEA to avoid any potential liability). An employer was entitled to rely upon that waiver even if the employee later became dissatisfied with how his severance or early retirement payments were calculated. Now, however, the LLFPA (assuming Petitioners' reading of the statute is correct) holds an employer liable for a past act of discrimination each time an employer issues a discriminatory early retirement payment – paid as a result of an employee signing a release – even if the employer had no reason to suspect that it had discriminated against an employee at the time the release was signed.

In other words, based on Petitioners' construction of the statute, the LLFPA now punishes employers for conduct that occurred prior to the signing of a release, regardless of its present intent and accomplishes this end retroactively. It allows an employee to challenge an early retirement payment as unlawful based solely on a discriminatory act that allegedly occurred prior to the

signing of a release so long as the employee does not receive the payment until after signing the release. Such extreme, primary retroactivity is clearly arbitrary and irrational and, therefore, the LLFPA violates the Fifth Amendment's Due Process Clause. *See Plaut*, 514 U.S. at 214; *Eastern Enters.*, 524 U.S. at 537-38 (O'Connor, J., joined by Rehnquist, C.J., Scalia and Thomas, J.J.); *Id.* at 547-50 (Kennedy, J., concurring); *In Re Workers' Comp. Refund*, 46 F. 3d 818, 819 (8th Cir. 1995); *NRG Co.*, 24 Cl. Ct. 51 (Cl. Ct. 1991).

2. Retroactive Application Of The LLFPA Also Violates The Ex Post Facto Clause, Article I, Section 9, Of The United States Constitution.

Article I, Section 9 of the Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. I, § 9; *see also Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-91 (1798) (prohibiting Congress from "making an action, done before the passing of the law, and which was innocent when done, criminal ...."). Although lower federal courts generally have not analyzed the Ex Post Facto Clause in civil cases, this Court has expressed an interest in revisiting its application to civil matters. For example, in *Eastern Enterprises*, Justice Thomas explained that he "would be willing to reconsider *Calder* and its progeny to determine

whether a retroactive civil law ... is ... unconstitutional under the Ex Post Facto Clause." 524 U.S. at 539.[3]

There is no conceptual obstacle to applying the Ex Post Facto Clause in the civil context. Even as formulated in *Calder*, the limitation placed on Congress' power for "mak[ing] an action, done before the passing of the law, and which was innocent when done, criminal; and punish[ing] such action," would squarely prohibit that which Congress has attempted to accomplish through the LLFPA. *Calder*, 3 U.S. (3 Dall.) at 390; *see*

---

[3] Commentators have argued that the Ex Post Facto Clause should apply to retroactive civil legislation. Their primary argument – a product of basic statutory construction – is that limiting the Ex Post Facto Clause to criminal legislation renders the clause redundant or unnecessary because the Bill of Attainder Clause already applies to retroactive criminal laws. *See* Laura Ricciardi and Michael Sinclair, *Retroactive Civil Legislation*, 27 U. Tol. L. Rev. 301, 316-18 (1996). Additionally, there is evidence that the phrase "ex post facto" was used synonymously with "retroactive" in every circumstance by the Framers of the Constitution, *see* 1 *W.W. Crosskey, Politics and the Constitution in the History of the United States* 335 (1953), and that the Framers intended it to have a commonly understood and civil meaning. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 212 (1980).

also Carmell v. Texas, 529 U.S. 513, 530 (2000). As explained above, before the LLFPA, an employer could safely issue an early retirement benefit payment after the signing of a release without incurring new liability as long as the employer did not commit some new act of discrimination. Again, under Petitioners' interpretation of the statute, the LLFPA makes that same employer's issuance of that same early retirement benefit payment unlawful, even if the only alleged discriminatory act occurred prior to signing a release of claims. Such retrospection is the heart of what the Ex Post Facto Clause prohibits.

This Court has also made clear that a law ostensibly identified as "civil" may nevertheless be penal in nature and akin to a criminal statute, thereby running afoul of the Ex Post Facto Clause. *See Weaver v. Graham*, 450 U.S. 24, 31 (1980) ("[I]t is the effect, not the form, of the law that determines whether it is *ex post facto*."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 595 (1952). "In determining whether legislation which bases a disqualification on the happening of a certain past event imposes a punishment, the Court has sought to discern the objects on which the enactment in question was focused." *Flemming v. Nestor*, 363 U.S. 603, 613-14 (1960). A civil sanction constitutes impermissible "punishment," where it "may not be fairly characterized as remedial, but only as a deterrent or retribution." *See United States v. Halper*, 490 U.S. 435, 449 (1989); *Myrie v. Comm'r, N.J. Dep't of Corr.*, 267 F.3d 251, 256 (3d Cir. 2001); *Johnson v. S.E.C.*, 87 F.3d 484 (D.C. Cir. 1996) (finding retroactive license suspension to be punishment).

Any attempt by Congress to revive claims that have already been waived by an employee is a "deterrent or retribution" on its face. The reviving of claims that have been waived cannot be considered remedial in nature because aggrieved employees were already armed with a cache of equitable, legal, and financial remedies prior to the LLFPA.

Because the LLFPA's resurrection of claims that had been waived operates to effect punishment, the fact that the legislation is superficially categorized as "civil" is of no consequence. Accordingly, retroactive application of the LLFPA is unconstitutional under the Ex Post Facto Clause.

II. Petitioners Have Presented No Compelling Reasons To Grant The Petition, Where The Eleventh Circuit's Opinion Affirming The District Court's Summary Judgment Order Applied Settled Law In Finding That There Was No Genuine Issue Of Material Fact That Pension Status Under The DROP Was Not A Proxy For Alleged Age Discrimination.

Petitioners urge this Court to reconsider its decision in *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008) in order to address the threshold of evidence required for a plaintiff's ADEA claims to withstand summary judgment on the issue of whether pension status is a proxy for age. Pet. at 24. Petitioners submit that the Eleventh Circuit improperly disregarded testimony by Detective Thomas Mangifesta, president of the police union, that the City insisted upon age as a component of DROP because it "wanted senior officers

to retire as soon as possible." Pet. at 25. As set forth more fully below, this Court provided ample guidance regarding the necessary threshold of evidence to support such claims in *Kentucky Retirement* and most recently in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). Accordingly, there are no compelling reasons for the Court to revisit this issue at the present time.

A. The Eleventh Circuit Applied This Court's Well-Settled Law In Affirming The District Court's Determination That Their Differential Treatment Was Not "Actually Motivated" By Age

In affirming the district court's decision, the Eleventh Circuit correctly applied this Court's decision in *Kentucky Retirement* in concluding that Petitioners had not shown that age "actually motivated" the City's decisions. Pet. App. at 5 (citing *Kentucky Ret. Sys.*, 128 S. Ct. at 2366). In *Kentucky Retirement*, this Court held that where an employer adopts a pension plan that includes age as a factor, and employees are then treated differently based on pension status, "a plaintiff, to state a disparate treatment claim under the ADEA must adduce sufficient evidence to show that the differential treatment was 'actually motivated' by *age*, not pension status." *Kentucky Ret. Sys.*, 128 S. Ct. at 2370 (emphasis in original).

To determine whether the disability retirement plan at issue in *Kentucky Retirement Systems* was "actually motivated" by age and thus violated the ADEA, this Court focused on six factors. First, this Court held that age and pension status are analytically distinct

concepts, and discriminating against someone on the basis of pension status (even when pension status is determined in part on age) is not necessarily indicative of age discrimination. *Id.* at 2367. Second, this Court considered whether the plan was part of "a set of complex systemwide rules" involving pensions and whether benefits were offered to all employees on the same non-discriminatory terms at the time they became employed. *Id.* Third, Kentucky's disability plan had a clear non-age related rationale for the disparity at issue (*i.e.*, to place individuals who were disabled prior to qualifying for normal retirement in a position where they would qualify for normal benefits). *Id.* at 2368. Fourth, older individuals were sometimes treated more favorably under Kentucky's plan. *Id.* at 2369. Fifth, the plan did not rely on any of the sorts of "stereotypical assumptions" that the ADEA sought to eradicate. *Id.* Finally, this Court determined that the difficulty that Kentucky would incur to develop an alternative plan demonstrated that the plan was not actually motivated by age. *Id.*

In this case, the Eleventh Circuit properly upheld the District Court's determination that many of the factors that led this Court to conclude that Kentucky was not motivated by age discrimination when it implemented its disability plan are also present with respect to the City's implementation of the DROP. Pet. App. at 40 -41. In *Kentucky Retirement Systems*, this Court made it clear that its discussion of these factors "provides an indication of what a plaintiff might show in other cases to meet his burden of proving that differential treatment based on pension status is in fact discrimination 'because of' age." *Id.* at 2370. Here, the

testimony by Detective Mangifesta upon which Petitioners rely falls far short of satisfying any of the factors set forth by this Court in *Kentucky Retirement Systems*. As such, Petitioners have not demonstrated any compelling reasons for this Court to review whether such testimony satisfies Petitioners' burden of establishing that the City's implementation of DROP was "actually motivated" by age.

B. Petitioners Have Not Shown That Age Was The "But-For" Cause Of The City's Decision To Implement DROP, As Required By This Court In *Gross v. FBL Financial Services, Inc.*

Petitioners fail to address whether their evidence meets the standard most recently set forth in *Gross*. In that decision, this Court made it clear that to establish a disparate treatment claim under the plain language of the ADEA, "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision." *Gross*, 129 S. Ct. at 2351. As discussed above, Petitioners cannot meet their burden in this case because, as the Eleventh Circuit properly found, the City's DROP treats officers differently based on their pension status and not their age. Thus, Petitioners' age is not the "but-for" cause of the City's decision.

Petitioners have not demonstrated any compelling reason for seeking this Court's review of the Eleventh Circuit's decision where the threshold of evidence for proving their ADEA claims has been settled by this Court. The Eleventh Circuit applied the well-established precedent of this Court in affirming the district court's

grant of summary judgment to the City. Accordingly, the Petition for Writ of Certiorari should be denied.

III. CONCLUSION

Petitioners have not established a compelling reason for this Court to grant their Petition for Writ of Certiorari. Accordingly, for all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

CITY OF FORT
LAUDERDALE,
FLORIDA

Gerald L. Maatman, Jr.
Counsel of Record
SEYFARTH SHAW LLP
131 South Dearborn Street
Suite 2400
Chicago, Illinois 60603
Telephone: (312) 460-5000
Facsimile: (312) 460-7000

Frederick T. Smith
SEYFARTH SHAW LLP
1545 Peachtree Street, N.E.
Suite 700
Atlanta, Georgia 30309
Telephone: (404) 885-1500
Facsimile: (404) 892-7056

Attorneys for Respondent